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MONTEREY, CALIFORNIA

MBA PROFESSIONAL REPORT

Evaluation of Construction Contract Claims

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December 2004

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AN ANALYSIS OF CONSTRUCTION CLAIMS FILED WITH THE ASBCA

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Submitted in partial fulfillment of the requirements for the degree of

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from the

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ABSTRACT

The purpose of this research is to analyze Armed Services Board of Contract Appeals decisions, over the past two years, relating to disputes in United States Government construction contracts in order to identify potential weaknesses in both government and contractor organizations. The project will identify categories of contract disputes as well as patterns of contract administration weaknesses for both the government and the contractor. The purpose is to highlight deficiencies, in both government and contractor actions, and use it to enlighten contracting officers to help preclude future litigation in this area.

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“I can do all things through Christ who strengthens me.” (Philippians 4:13)
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I. INTRODUCTION

A. AREA OF RESEARCH

This research examines twenty-seven months worth of construction claims filed with the Armed Service Board of Contract Appeals (ASBCA) from January 2002 to March 2004. All claims were filed in accordance with the Contracts Disputes Act of 1978. This thesis includes an analysis of the ASBCA's findings and independent research data with respect to events leading up to the dispute and the actions of the appellant and respondent.

B. THESIS OBJECTIVE

This research evaluates the disputes that arise between the Government and contractors in the area of construction projects. It analyzes types of claims filed with the ASBCA as well as the decisions of the court. This research also determines areas of weaknesses and strengths of each party involved in the dispute, which leads to a better understanding of the steps necessary to preclude litigation of the same nature in the future.

C. RESEARCH QUESTIONS

1. Primary Research Question

What issues arise between the Federal Government and construction contractors, which warrant the filing of a claim with the ASBCA?

2. Secondary Questions

- What are the common areas of disagreement, which result in claims filed by construction contractors?
- Were there any common mistakes made by either party of the contract that resulted in the filing of a claim?
- Are there steps that Government contracting officers can take to preclude the same mistakes from happening in the future?

D. SCOPE

The scope of this thesis includes: (1) a review of the regulations and steps regarding the disputes process; (2) an examination of the ASBCA cases and their decisions; and (3) presentation and analysis of ninety-nine construction claims. The thesis concludes with relevant suggestions and recommendations to assist Government

contracting officers and construction contractors in identifying potential pitfalls and how to avoid them.

E. METHODOLOGY

The methodology used in this thesis research includes:

- A comprehensive literature search of Government reports, internet-based materials and library information resources such as Lexis-Nexis.
- A documentation review of available construction claims focusing on the administrative side of the disputes process via archives involving ASBCA decisions handed down over the previous twenty-seven months.

F. ORGANIZATION

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 - C. Answers to Research Questions
 - D. Suggested Areas for Further Research

G. BENEFITS OF RESEARCH

This thesis is designed to benefit the Department of Defense by providing unique insight and feedback regarding the claims filed from construction contracts. The researchers' intentions are to provide a critical analysis of the construction claims to facilitate a better understanding of Government and contractor shortfalls, and miscues resulting in litigation.

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II. BACKGROUND OF CONTRACT DISPUTES APPEALS PROCESS

A. OVERVIEW OF THE CONTRACT DISPUTES APPEALS PROCESS

This chapter discusses the contract dispute appeals process. It includes definitions, judicial process, administrative process, and alternate disputes resolution (ADR). After receiving a Contracting Officer's Final Decision, a contractor has two courses of actions to appeal the decision - the judicial process or the administrative process.

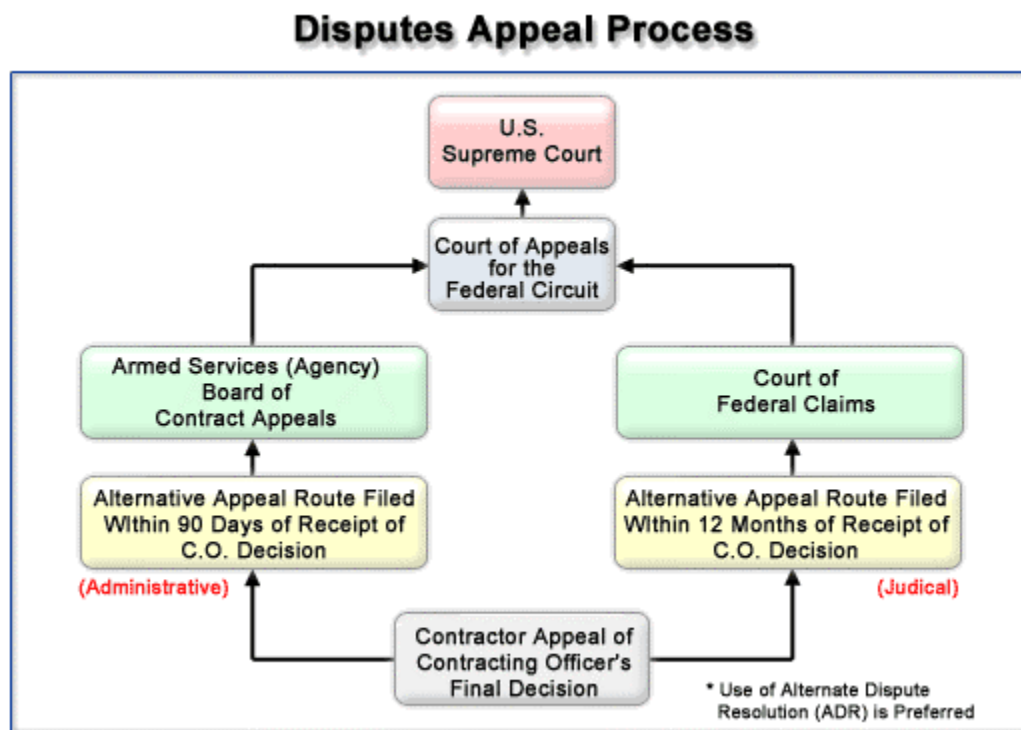


Figure 1: Dispute Appeal Process

Source: Acquisition Community Connection

The judicial process begins with the Court of Federal Claims and continues through the Court of Appeals for the Federal Circuit. The administrative process begins at the Armed Services Board of Contract Appeals (ASBCA) and continues to the Court of Appeals for the Federal Circuit. Appeals from both processes may end up at the U.S. Supreme Court. However, the dispute can also be resolved using ADR.

B. DEFINITIONS

1. **Contract Disputes Act of 1978** (see Appendix A): provides procedures and requirements for asserting and resolving claims in cases such as: (a) The payment of interest on contractor claims; (b) Certification of contractor claims; and (c) A civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

2. **Claim**: a written assertion by one of the contracting parties seeking: the payment of money in a certain amount; the adjustment or interpretation of contract terms; or other relief relating to the contract. Contractors must provide certification -- the claim is made in good faith; the supporting data are accurate and complete; and the amount requested is duly owed to the contractor -- when submitting any claim exceeding \$100,000. (Acquisition Community Connection)

3. **Contracting Officer's Final Decision (COFD)**: a contracting officer must issue a written decision on any claim less than \$100,000 within 60 days of receiving a contractor's written request. On any claim greater than \$100,000, the contracting officer has 60 days from the receipt of the certified claim to issue a written decision or notify the contractor of the time within which a decision will be issued. (Acquisition Community Connection)

4. **Alternative Disputes Resolution (ADR)**: Any means of settling disputes outside of the courtroom. ADR typically includes arbitration, mediation, early neutral evaluation, and conciliation. The arbitration agreement and decision of the arbiter may be enforceable under federal law. (Acquisition Community Connection)

5. **Arbitration**: a simplified version of a trial involving the presentation of a dispute to an impartial or neutral individual (arbitrator) or panel (arbitration panel) for issuance of a binding decision. The third party's decision generally has the force of law but does not set a legal precedent. (Acquisition Community Connection)

6. **Mediation**: the intervention into a dispute or negotiation of an acceptable, impartial, and neutral third party (mediator) who has no decision-making authority. A mediator is an individual trained in negotiations that brings opposing parties together and attempts to reach a settlement or agreement that both parties can either accept or reject. (Acquisition Community Connection)

7. **Mini-trial:** voluntary and non-binding on parties involved in a contract dispute. In the mini-trial, authority for resolution of issues rests with senior managers representing each party who act -- to the extent authorized -- as decision-makers. (Acquisition Community Connection)

8. **Settlement Judge:** A settlement judge is an administrative judge who does not have any decision-making authority in the appeal and who is appointed for the sole purpose of facilitating settlement. It is possible to make a settlement by in-depth discussions with both parties regarding their strengths and weaknesses. There is not a set agenda. It remains flexible to meet the requirements of each case. A settlement judge's recommendations are not binding. (Alternative Dispute Resolution: A Resource Guide)

9. **Summary Trial with Binding Decision:** A summary trial with binding decision is a procedure where the appeal is expedited and the parties try their appeal informally before an administrative judge. A summary decision generally is given at the end of the trial. All parties must agree that the decision is final and cannot be appealed unless fraud is found in the proceedings. (Alternative Dispute Resolution: A Resource Guide)

10. **Fact-finding:** The investigation of specified issues by a neutral third party -- selected by the parties -- who has subject-matter expertise. Fact-finding is an investigatory process that utilizes informal procedures. (Acquisition Community Connection)

C. DISPUTE PROCESS

1. Initiation of a Claim

The contractor must submit a claim to the Government within six years. The claim must be in writing. The contracting officer must submit a decision within a reasonable period of time. The six-year time frame is not relevant if the claim alleges any type of fraud.

2. Claim Requirements

The contractor must specify the amount claimed when submitting a claim. The person initiating the claim must be someone with the authority to bind the contractor. The contractor is required to make the following certification when submitting a claim:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor. (FAR 33.207(c))

3. Contracting Officer's Responsibilities

The contracting officer must submit a written decision when a claim by the contractor is received. When preparing the final decision, it is the contracting officer's responsibility to review all critical facts regarding the claim. The contracting officer should seek legal counsel when preparing the documentation. At a minimum, the final decision should contain the following items:

- (i) Description of the claim or dispute;
- (ii) Reference to the pertinent contract terms;
- (iii) Statement of the factual areas of agreement and disagreement;
- (iv) Statement of the contracting officer's decision, with supporting rationale;
- (v) Paragraph substantially as follows:

This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of \$50,000 or less or its accelerated procedure for claims of \$100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C.603, regarding Maritime

Contracts) within 12 months of the date you receive this decision;
and

(vi) Demand for payment prepared in accordance with [32.610\(b\)](#) in all cases where the decision results in a finding that the contractor is indebted to the Government. (FAR 33.211(4))

The contracting officer must submit a decision within 60 days for all claims under \$100,000. However, on claims over \$100,000, he must notify the contractor if the decision will not be completed in 60 days. When determining a reasonable time, the contracting officer and the Board evaluate the complexity, the cost of the claim, amount of supporting document submitted by the contractor, and any other relevant factor. For example, in Defense Sys. Co., ASBCA No. 50534, 97-2 ASBCA 28,981, the Board found that holding the decision for over nine months was reasonable for a \$72 million claim.

D. JUDICIAL DISPUTES APPEAL PROCESS

1. Contractor Appeal of Contracting Officer's Final Decision

The contracting officer's decision is final unless the contractor appeals or files suit against the Government. The contractor must file a request for an alternative appeal within 12 months of receipt of the COFD. However, use of ADR is the preferred method to use in lieu of formal litigation.

2. U.S. Court of Federal Claims

If the contractor chooses formal litigation, the case will be heard in the U.S. Court of Federal Claims. The Court of Federal Claims is authorized to hear, primarily, money claims founded upon the Constitution, Federal statutes, executive regulations, or contracts, express or implied-in-fact, with the U.S. Contract claims account for over one-third of the Court's workload. Another aspect of the Court's jurisdiction involves government contracts.

Formerly, the U.S. Claims Court, the Court of Federal Claims was established in 1982 as the successor to the trial division of the Court of Claims. The Court consists of sixteen judges, who are nominated by the President and confirmed by the Senate for a term of fifteen years.

3. U.S. Court of Appeals for the Federal Circuit

If dissatisfied with the decision of the Court of Federal Claims, the disappointed party can appeal to U.S. Court of Appeals for the Federal Circuit. The Court of Appeals is an intermediate appellate court in the federal judicial system. Being an appellate court, the Court of Appeals does not hold trials. The court decides whether the lower court reached the right conclusion in the case, based on the evidence presented, so the Court of Appeals considers only the record.

The Court of Appeals was created in 1982, to relieve the pressure on the dockets of the Supreme Court and the courts of appeals for the regional circuits. The court consists of twelve judges, who are appointed for life by the President with the advice and consent of the Senate.

4. U.S. Supreme Court

If dissatisfied with the decision of the Court of Appeals for the Federal Circuit, the disappointed party can seek additional review in the Supreme Court. When reviewing cases, the Court ensures uniformity of decisions in which constitutional issues have been decided, or in which two or more lower courts have reached different results. However, chances of getting the Court to review a case are very remote because the Supreme Court primarily reviews cases that involve matters of great national importance. In addition, the Supreme Court only accepts a small number of cases each term.

The U.S. Supreme Court consists of nine justices, who are appointed for life by the President with the advice and consent of the Senate.

E. ADMINISTRATIVE APPEAL PROCESS

1. Overview

The ASBCA follows the administrative appeals process. It operates under a charter (see Appendix B) that was established by the Secretary of the Defense pursuant to the Contract Disputes Act of 1978. It provides a forum for contractors to appeal decisions made by the officer. The charter establishes guidelines and membership of the board members. In 1997, The ASBCA established 36 rules ([see Appendix C](#)) to provide the operating procedures of the Board.

2. Contractor Appeal of Contracting Officer's Final Decision

After issuance of the COFD, the contractor has 90 days to appeal to the ASBCA. The contractor must submit in writing the nature of the appeal. The appeal must contain at a minimum the following items: contract number, agency involved in the dispute, the decision of the claim, amount of claim, and the signature of the person taking the appeal. The contractor must submit a copy of the claim to the Contracting Officer.

3. Armed Services Board of Contract Appeals

There are only two options to submit an appeal to the ASBCA without a COFD. If the contractor has submitted a claim to the contracting officer for under \$100,000 and requested a response within 60 days, and the contracting officer does not timely respond, the contractor may submit an appeal. The second option is if the contractor submitted a properly certified claim for over \$100,000 and the contracting officer did not respond in a timely manner, the contractor may submit an appeal.

The appellant may request an optional accelerated procedure if the claim is for \$100,000 or less. It is the sole discretion of the appellant to make such a request, and it must be in writing. The decision will be made within 180 days to the maximum extent practicable. If the claim is for less than \$50,000, the appellant may request to process the claim through the expedited small claims procedure. This is also at the sole discretion of the appellant. The decision will be made within 120 days to the maximum extent practicable.

Within 30 days of notice of the appeal, the contracting officer must submit the following items to the ASBCA and the appellant: the COFD for which the appeal has been submitted, the contract to include all pertinent specifications and amendments, all correspondence between all parties involved in the dispute, transcription for any proceedings, and any other relevant information.

All decisions made by the ASBCA are forwarded to both parties. If the appeal is not contested, all monetary payments must be paid expeditiously. All decisions, unless classified, will be made public.

Under the Equal Access to Justice Act, the contractor may recover some fees associated with the appeals process. All requested fees must be considered reasonable. Current market conditions will dictate reasonableness. However, attorney fees may not exceed \$125 per hour.

4. U.S. Court of Appeals for the Federal Circuit

If the appellant is dissatisfied with the decision from the ASBCA, he may take the appeal to the U.S. Court of Appeals for the Federal Circuit. The proceedings then follow the same procedure as noted in the judicial process outlined in paragraph C. 3 &4.

F. ALTERNATIVE DISPUTES RESOLUTION

ADR procedures are used anytime the contracting officer has the authority to resolve an issue in dispute. ADR procedures may be applied to all or a portion of the claim. The Government or the contractor may voluntarily elect to participate in ADR with an agreement by the other party. Agreement to use ADR must be in writing and specify the maximum monetary award the arbitrator may issue, in addition to any other conditions that limit the range of possible outcomes.

The Administrative Disputes Act of 1996 was implemented to authorize the use of ADR in federal procurement. Various federal agencies have established specific procedures for conducting ADR procedures.

Contracting Officers are required to utilize ADR to the maximum extent practicable. The benefits of electing to use ADR procedures are: reduction in the number of disputes that result in litigation; decrease in costs associated with dispute resolution; and a decrease in time spent resolving disputes.

If ADR is used after the issuance of a COFD, the use does not alter any of the time limitations or procedural requirements for filing an appeal of the COFD and its use does not constitute a reconsideration of the final decision.

ADR forums include use of mediation, arbitration, mini-trials, settlement judge, summary trial with binding decision, and fact-finding.

G. CHAPTER SUMMARY

Although the contractor has the right to appeal a decision, the contracting officer is encouraged to attempt to resolve the matter at the lowest level possible. Alternate Disputes Resolution procedures can be utilized in forms such as arbitration or mini-trials.

The Contract Disputes Act of 1978 establishes procedures for submitting claims. The contractor has two options to appeal a Contracting Officer's Final Decision. The contractor may elect to pursue the judicial process, which includes the U.S. Court of Federal Claims and Court of Appeals for the Federal Circuit. The contractor's other option is to pursue the appeal through the administrative process and go to the ASBCA. Each process contains its own time limitations and distinct guidelines. However, both processes can lead to a contractor's appeal to the U.S. Supreme Court.

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III. DATA INFORMATION

A. OVERVIEW

This chapter discusses the data the researchers utilized for this project. The chapter begins with description and location of data gathered, followed by discussion of the methodology utilized. The chapter continues with a listing of the cases evaluated. The data is organized in several methods to determine trends in the construction cases analyzed. This chapter provides a clear and concise presentation of the data to include several charts.

B. DESCRIPTION AND LOCATION OF DATA

The researchers obtained a majority of their information from the ASBCA website (<http://www.law.gwu.edu/asbca/>). Every contract dispute evaluated by ASBCA from January 2002 to March 2004 was examined to separate construction contract claims from other disputes. ASBCA had 99 construction contract disputes during the period of January 2002 to March 2004.

C. METHODOLOGY

The researchers' intent was to determine any trends that may exist in the construction contract claims submitted to ASBCA. After each case was carefully recorded, the researchers organized the data using several methods to determine any trends. The data was analyzed utilizing the Microsoft Excel Program.

D. ASBCA CONSTRUCTION CASES

The researchers examined each decision made by ASBCA. The cases are listed in chronological order from January 2002 to March 2004. Each case was evaluated and analyzed for trends.

The following elements of the cases were recorded and analyzed:

Case Name	Contractor/person submitting claim to ASBCA
Case Number	Case number assigned by ASBCA
Case Date	Decision date by ASBCA
Department of Government	Describes the branch of service involved with the claim. The Corps of Engineering was annotated separately from the U.S. Army
Location of Performance	Describes where the construction occurred or should have occurred
Contract Number	Assigned by contracting office awarding original contract
Dollar Value of Contract	Describes value of original contract. If it was unavailable, the database input was \$0.00.
Dollar Value of Claim	Describes value of claim submitted. If data was not provided, the database input was \$0.00.
Reason for Dispute	Describes why the claim was submitted to ASBCA. The reason was determined by analyzing the case file as submitted to ASBCA. If more than one reason was noted, the database input was “multiple.”
Court’s Decision	Describes the decision made by ASBCA. If claim had more than one decision, it was annotated with “multiple.”

Table 1: Elements of Claims

Source: Researchers

The Researchers evaluated the following 99 claims regarding construction contracts brought before ASBCA:

Case Name	Case Number	Case Date	Department of Government
W.R. Henderson Construction Inc	52938	01 Feb 02	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
San Miguel County, NM	DACW47-97-C-0028	\$384,995.00	\$140,178.00
Reason for Dispute		Board's Decision	
Differing Site Conditions		sustained/denied	
Case Name	Case Number	Case Date	Department of Government
Moore & Cowart Ktr, Inc	54014	02 Mar 04	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
El Paso, TX	DACW47-02-C-0009	\$3,690,793.00	\$13,388.44
Reason for Dispute		Board's Decision	
Defective Specifications		sustained	
Case Name	Case Number	Case Date	Department of Government
Sherman R. Smoot Corporation	52149	04 Nov 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Washington Naval Yard, WA	N62477-94-C-0028	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Constructive Change		sustained	
Case Name	Case Number	Case Date	Department of Government
Ryan Company	53385	06 Mar 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Camp Pendleton, CA	N68711-92-C4710	\$0.00	\$136,865.00
Reason for Dispute		Board's Decision	
equitable adjustment via Summary Judgment		denied	
Case Name	Case Number	Case Date	Department of Government
Ryan Company	53385	06 Nov 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Camp Pendleton, CA	N68711-92-C-4710	\$0.00	\$136,865.00
Reason for Dispute		Board's Decision	
Defective Specifications		denied	

Case Name	Case Number	Case Date	Department of Government
Randolph & Company Inc	multiple	06 Nov 02	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Charleston, SC	DACW60-94-C-0020	\$0.00	\$858,800.13
Reason for Dispute	Board's Decision		
multiple	multiple decisions		
Case Name	Case Number	Case Date	Department of Government
Thomas & Sons Building Contractors, Inc	51590, 53052	09 Apr 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Wilmington, DE	N62472-90-C-0410	\$118,569.00	\$0.00
Reason for Dispute	Board's Decision		
differing Site Conditions/Liquidated Damages	Denied in part		
Case Name	Case Number	Case Date	Department of Government
Southeast Technical Services	52319	09 Jan 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Millington, TN	N62467-99-M-5181	\$37,535.00	\$0.00
Reason for Dispute	Board's Decision		
Termination for Default	denied		
Case Name	Case Number	Case Date	Department of Government
Coastal Drilling, Inc.	54023	1 Apr 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Neville Island, PA	DACW59-99-C-0002	\$0.00	\$380,000.00
Reason for Dispute	Board's Decision		
Failure to cooperate	dismissed		
	--denied		
	--sustained		
Case Name	Case Number	Case Date	Department of Government
Hubsch Industrieanlagen Spezialbau GmbH	51937	1 Feb 02	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Patch Barracks, Stuttgart, Germany		\$8,067,269.00	\$1,143,427.80
Reason for Dispute	Board's Decision		
Recovery expenses	sustained in part, denied in part		
Case Name	Case Number	Case Date	Department of Government
Arnold M. Diamond, Inc.	53724	1 Jul 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Ft. Bragg, NC	DACA21-99-C-0058	\$0.00	\$32,428.29

Reason for Dispute		Board's Decision	
Contract Interpretation		other (explain)	
Case Name	Case Number	Case Date	Department of Government
Arnold M. Diamond, Inc.	53725	1 Jul 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Ft. Bragg, NC	DACA21-99-C-0058	\$0.00	\$81,594.94
Reason for Dispute		Board's Decision	
Contract Interpretation		denied	
Case Name	Case Number	Case Date	Department of Government
Caddell Construction Co., Inc.	53144	1 May 02	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Sunflower Army Ammo	DACA41-92-C-0016	\$0.00	\$0.00
Plant KS			
Reason for Dispute		Board's Decision	
Overhead Entitlement		denied	
Case Name	Case Number	Case Date	Department of Government
HGM Inc.	53150	10 Feb 03	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Wheeler Army Airfield, HI	DAPC50-99-P-6069	\$22,000.00	\$11,687.50
Reason for Dispute		Board's Decision	
Contract Interpretation		denied	
Case Name	Case Number	Case Date	Department of Government
Parson's Main Inc	51355, 51717	10 Jun 02	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
St Louis, MO	DACA41-94-C-0103	\$38,400,000.00	\$8,733,427.00
Reason for Dispute		Board's Decision	
Defective Specifications		sustained	
Case Name	Case Number	Case Date	Department of Government
General Dynamics Corporation	49372	10 Jun 02	DCMA
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
	N00024-88-C-2000	\$0.00	\$3,136,392.00
Reason for Dispute		Board's Decision	
Allowability of legal expenses		sustained	
Case Name	Case Number	Case Date	Department of Government
American Renovation & Construction Co.	53946	10 Sep 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim

Mountain Home AFB, ID	DACA67-00-C-0220	\$0.00	\$4,315,640.00
Reason for Dispute		Board's Decision	
Differing Site Conditions		denied	
Case Name	Case Number	Case Date	Department of Government
Rio Construction Corporation	54273	11 Feb 04	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Barceloneta, Puerto Rico	DACW17-01-C-0013	\$10,555,240.00	\$67,102.54
Reason for Dispute		Board's Decision	
Contract Interpretation		sustained	
Case Name	Case Number	Case Date	Department of Government
Blueridge General, Inc.	53663	11 Jul 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Langley AFB, VA	DACA65-99-C-0052	\$2,962,722.00	\$23,495.20
Reason for Dispute		Board's Decision	
Contract Interpretation		other (explain)	
Case Name	Case Number	Case Date	Department of Government
Blake Construction Co., Inc.	52305, 52475	12 Feb 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Camp Pendleton	N68711-91-C-0116	\$18,723,599.00	\$0.00
Reason for Dispute		Board's Decision	
Equitable Adjustment		52305 Denied, 52475 Dismissed	
Case Name	Case Number	Case Date	Department of Government
Costruzioni & Impianti	53853	12 Mar 03	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
	NAFVC2-98-C-0015	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Termination for Default		dismissed	
		--denied	
		--sustained	
Case Name	Case Number	Case Date	Department of Government
Manshul Construction Corp.	47795, 47797	13 Feb 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
NAS Staten Island NY	N62472-84-C-0268, N62472-89-C-	\$0.00	\$1,085,087.00
	0071		
Reason for Dispute		Board's Decision	
Bankruptcy Trustee Motion for Reconsideration		other (explain)	
Case Name	Case Number	Case Date	Department of Government
Randolph and Company, Inc.	52953, 52954	13 Jan 03	Corps of Engineering

Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
	DACW60-94-C-0020	\$0.00	\$0.00
Reason for Dispute	Board's Decision		
Defective Specifications	denied		
Case Name	Case Number	Case Date	Department of Government
Dennis Berlin (dba Spectro Sort...	51919, 51932, 524000	13 May 02	U.S. Air Force
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
	F04606-93-D-0458	\$0.00	\$0.00
Reason for Dispute	Board's Decision		
Termination for Default	Denied		
Case Name	Case Number	Case Date	Department of Government
Weststar, Inc.	52837, 53171	14 Apr 03	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
MC Air Station, AZ	N68711-96-C-5048	\$2,633,446.75	\$612,764.00
Reason for Dispute	Board's Decision		
Constructive Change	dismissed		
	--denied		
	--sustained		
Case Name	Case Number	Case Date	Department of Government
Insulation Specialties Inc.	DACA65-92-C-0170	14 Aug 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Ft Lee, VA	DACA65-92-C-0170	\$995,990.00	\$1,080,910.00
Reason for Dispute	Board's Decision		
Government Delays	other (explain)		
Case Name	Case Number	Case Date	Department of Government
Dawkins General Contractors & Supply, Inc	48535	14 Jul 03	
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Cleveland, Ohio	NAS3-26528	\$0.00	\$301,798.00
Reason for Dispute	Board's Decision		
Contract Interpretation			
Case Name	Case Number	Case Date	Department of Government
Ursula Huebsch	50267	14 Mar 02	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Rhein Main AFB, Germany	DACA90-90-C-0405	\$23,522,543.00	\$324,175.00
Reason for Dispute	Board's Decision		
Motion to dismiss	dismissed		
	--denied		
	--sustained		
Case Name	Case Number	Case Date	Department of Government
John J. Kuqali General Contractor	53979	14 Mar 03	U.S. Air Force

Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Hanscom AFB, MA	F19650-01-P-0502	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Termination for Default		dismissed	
		--denied	
		--sustained	
Case Name	Case Number	Case Date	Department of Government
Fru-Con Construction Corp	53544	15 Jan 02	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Ohio River, WV	DACW69-93-C-0022	\$35,582,600.00	\$0.00
Reason for Dispute		Board's Decision	
Equitable Adjustment		denied	
Case Name	Case Number	Case Date	Department of Government
Atherton Const. Inc	44293, 46053, 51178	15 Jul 02	U.S. Air Force
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Malmstrom AFB MT	F24604-90-C-0006	\$1,171,656.00	\$153,951.00
Reason for Dispute		Board's Decision	
Failure to cooperate		denied	
Case Name	Case Number	Case Date	Department of Government
Holmes & Narver Constructors, Inc	52429, 52551	15 May 02	U.S. Air Force
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Columbus AFB, MS	F41622-98-C-0034	\$0.00	\$508,677.00
Reason for Dispute		Board's Decision	
Failure to disclose vital information		52429 - dismissed, 52551 - denied	
Case Name	Case Number	Case Date	Department of Government
William F. Klingensmith, Inc	52028	15 Nov 02	Dept of Health and Human Services
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
	263-93-C-0434	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Liquidated Damages Appeal		denied	
Case Name	Case Number	Case Date	Department of Government
Management Resource Associates, Inc.	49457, 50866	16 Jan 03	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Oceana NAS, VA	N62470-88-C-6017	\$165,000.00	\$106,366.88
Reason for Dispute		Board's Decision	
Government Delays		denied	
Case Name	Case Number	Case Date	Department of Government
Phillips National	53241	16 Mar 04	U.S. Navy

Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
El Centro, CA	N68711-96-C-2168	\$7,563,491,000.00	\$2,000,000.00
Reason for Dispute		Board's Decision	
constructive acceleration		denied	
Case Name	Case Number	Case Date	Department of Government
Southern Playground Inc	43797, 43798	16 Sep 02	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Honolulu, HI	DACA83-89-C-0004	\$175,330.00	\$0.00
Reason for Dispute		Board's Decision	
Constructive Change		denied	
Case Name	Case Number	Case Date	Department of Government
St Paul Fire and Marine Insurance Company	53228	16 Sep 02	U.S. Air Force
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Fort Gellum, GA	F41689-96-C0257	\$0.00	\$318,567.36
Reason for Dispute		Board's Decision	
motion to dismiss due to lack of clarity		denied	
Case Name	Case Number	Case Date	Department of Government
Collette Contracting Inc.	53706	17 Oct 02	U.S. Air Force
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
	F28609-00-C-0003		\$1,187,786.63
Reason for Dispute		Board's Decision	
Failure to cooperate		denied	
Case Name	Case Number	Case Date	Department of Government
Lamb Engineering & Construction Co	53360	17 Sep 02	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
	DAHA02-98-C-0001	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Government Delays		other (explain)	
Case Name	Case Number	Case Date	Department of Government
Konitz Contracting Inc.	53433	18 Apr 02	U.S. Air Force
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
FE Warren WY	F48608-96-D-0007	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Equitable adjustment		denied	
Case Name	Case Number	Case Date	Department of Government
ACEquip Ltd	53479	18 Dec 02	U.S. Air Force

Location of Performance Contract Number		Dollar value of Contract	Dollar value of Claim
Kadena Air Base, Japan	F33600-99-C-0081	\$0.00	\$12,960.00
Reason for Dispute		Board's Decision	
Liquidated Damages Appeal		sustained	
Case Name	Case Number	Case Date	Department of Government
Larson Construction Services, Inc.	53443	18 Jan 02	Corps of Engineering
Location of Performance Contract Number	Dollar value of Contract		Dollar value of Claim
Ft. Rucker AL	DACA01-00-C-0005	\$1,435,250.00	\$94,691.92
Reason for Dispute		Board's Decision	
Equitable Adjustment		denied	
Case Name	Case Number	Case Date	Department of Government
C Pyramid Enterprises, Inc.	53626, 53627	18 Jul 02	U.S. Navy
Location of Performance Contract Number	Dollar value of Contract		Dollar value of Claim
NAS Key West	N62467-95-C-1018	\$14,852,218.00	\$0.00
Reason for Dispute		Board's Decision	
Defective Specifications		Denied	
Case Name	Case Number	Case Date	Department of Government
Sherman R. Smoot Corporation	52150	18 Nov 02	U.S. Navy
Location of Performance Contract Number	Dollar value of Contract		Dollar value of Claim
Washington Naval Yard, WA	N62477-94-C-0028	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Constructive Change		denied	
Case Name	Case Number	Case Date	Department of Government
Ryan Company	53230	19 Apr 02	U.S. Air Force
Location of Performance Contract Number	Dollar value of Contract		Dollar value of Claim
Altus AFB, OK	F34612-93-C-0006	\$2,153,951.95	\$426,405.00
Reason for Dispute		Board's Decision	
Equitable adjustment		denied	
Case Name	Case Number	Case Date	Department of Government
Jerry Dodds dba Dodds & Associates	51682	19 Apr 02	U.S. Navy
Location of Performance Contract Number	Dollar value of Contract		Dollar value of Claim
Marine Corps Logistics Base, GA	N62467-95-C-3623	\$251,210.00	\$519,333.00
Reason for Dispute		Board's Decision	
Liquidated Damages Appeal and Equitable Adjustment		denied	
Case Name	Case Number	Case Date	Department of Government

M.A. Mortenson Company	52881, 52882, 52883, 53397, 53713, 53796, 53797	19 Jun 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Elmendorf AFB, AK	DACA85-94-C-0031	\$0.00	\$0.00
Reason for Dispute	Board's Decision		
Failure to cooperate/CO Final Decision	other (explain)		
Case Name	Case Number	Case Date	Department of Government
Marine Contractors Inc.	54017	2 Apr 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Neville Island, PA	DACW59-99-C-0002	\$0.00	\$301,695.60
Reason for Dispute	Board's Decision		
Termination for Default	dismissed		
	--denied		
	--sustained		
Case Name	Case Number	Case Date	Department of Government
Morgan & Son Earthmoving, Inc	53524	20 May 02	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Yakima Training Center, Washington	DACA67-99-C-0007	\$1,799,838.40	\$242,874.74
Reason for Dispute	Board's Decision		
Lack of Jurisdiction determination	denied		
Case Name	Case Number	Case Date	Department of Government
AEC Corporation, Inc	42920	20 Nov 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Naval and Marine Corps Reserve Training Center, Fl	N62467-88-C-0646	\$0.00	\$663,843.10
Reason for Dispute	Board's Decision		
Termination for Default	dismissed		
	--denied		
	--sustained		
Case Name	Case Number	Case Date	Department of Government
Callejas & Ross, Inc.	53854	21 Apr 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Ft. Hood, Tx	DACA63-99-C-0040	\$1,360,000.00	\$207,407.00
Reason for Dispute	Board's Decision		
Liquidated Damages Appeal			
Case Name	Case Number	Case Date	Department of Government
All-State Construction	50586	21 Feb 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Unknown	N62472-93-C0396	\$0.00	\$0.00

Reason for Dispute		Board's Decision	
Termination for Default		sustained	
Case Name	Case Number	Case Date	Department of Government
L & M Thomas Concrete Co. Inc.	49198, 49615	21 Feb 03	U.S. Air Force
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Wright-Patterson AFB, OH	F33601-95-C-W015	\$350,000.00	\$0.00
Reason for Dispute		Board's Decision	
Termination for Default		denied	
Case Name	Case Number	Case Date	Department of Government
The Sherman R. Smoot Corp.	52173, 73049, 53246	21 Mar 03	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Washington Navy Yard	C62477-94-C-0028	\$19,073,139.00	\$0.00
Reason for Dispute		Board's Decision	
Contract Interpretation		sustained	
Case Name	Case Number	Case Date	Department of Government
Thomas & Sons Building Contractor, Inc	51590, 53052	22 Jul 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Wilmington, DE	N62472-90-C-0410	\$118,569.00	\$0.00
Reason for Dispute		Board's Decision	
Request for reconsideration		denied	
Case Name	Case Number	Case Date	Department of Government
Catel Inc.	52224	23 Jan 02	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
McGuire AFB NJ	DACA51-98-C-0061	\$302,000.00	\$75,857.56
Reason for Dispute		Board's Decision	
Contract Interpretation		denied	
Case Name	Case Number	Case Date	Department of Government
Fire Security Systems Inc.	53498	24 Jul 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
	N62467-99-C-1017	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Equitable adjustment		denied	
Case Name	Case Number	Case Date	Department of Government
American Renovation & Construction Company	F41622-98-C-0011	24 Jun 03	U.S. Air Force
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim

Malmstrom AFB, MT	F41622-98-C-0011	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Termination for Default		denied	
Case Name	Case Number	Case Date	Department of Government
Bender GmbH	52052	24 Jun 03	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Hoppstadten Waterworks, Germany	DAJA90-97-C-0005	\$218,606.20	\$0.00
Reason for Dispute		Board's Decision	
Termination for Default		denied	
Case Name	Case Number	Case Date	Department of Government
The Sherman R. Smoot Corp.	53115	25 Feb 03	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Washington Navy Yard	D62477-94-C-0028	\$19,073,139.00	\$0.00
Reason for Dispute		Board's Decision	
Government Delays		sustained	
Case Name	Case Number	Case Date	Department of Government
Wilco Construction Inc	53683	25 Jul 02	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Ft Sill, OK	DACA56-00-C-2021	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Defective Specifications		denied	
Case Name	Case Number	Case Date	Department of Government
Dae Shin Enterprises, Inc. (dba Dayron)	50533	25 Nov 02	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Rock Island IL	DAAA09-95-C-0115	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Termination for Default		Denied	
Case Name	Case Number	Case Date	Department of Government
TLT Construction Corporation	53769	26 Aug 02	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Ft Bragg, NC	DACA21-97-D-0015	\$0.00	\$0.00
Reason for Dispute		Board's Decision	
Motion to Dismiss		Granted	
Case Name	Case Number	Case Date	Department of Government
The Sherman R. Smoot Corp.	52261	26 Feb 03	U.S. Navy

Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Washington Navy Yard	D62477-94-C-0028	\$19,073,139.00	\$67,854.00
Reason for Dispute	Board's Decision		
Constructive Change	other (explain)		
Case Name	Case Number	Case Date	Department of Government
Fire Security Systems Inc.	53498	26 Mar 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Naval Support Activity LA	N62467-99-C-1017	\$0.00	\$0.00
Reason for Dispute	Board's Decision		
Scope determination	denied		
Case Name	Case Number	Case Date	Department of Government
TPS Inc	52421	26 Mar 04	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Key West Naval Air Station, Florida	N62467-95-C-2739	\$274,257.00	\$600,207.88
Reason for Dispute	Board's Decision		
Defective Specifications	denied		
Case Name	Case Number	Case Date	Department of Government
McKenzie Engineering Company	53374	27 Aug 02	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Rock Island, IL	DACA25-96-C-0044	\$0.00	\$0.00
Reason for Dispute	Board's Decision		
Cardinal Change Claim	denied		
Case Name	Case Number	Case Date	Department of Government
G & C Enterprises, Inc.	53830	27 Aug 03	U.S. Air Force
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
US Naval Station, Guam	F41689-93-C-0505	\$0.00	\$454,104.00
Reason for Dispute	Board's Decision		
Differing Site Conditions	denied		
Case Name	Case Number	Case Date	Department of Government
PNL Commercial Corp	53816	27 Feb 04	U.S. Air Force
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Patrick AFB, FL	NAFTJ3-00-C-0010	\$0.00	\$43,453.09
Reason for Dispute	Board's Decision		
Attorney's Fees	dismissed		
	--denied		
	--sustained		
Case Name	Case Number	Case Date	Department of Government
DD-M Crane & Rigging	53881	27 Jan 03	Corps of Engineering

Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
	DACW05-00-C-0009	\$1,333,219.00	\$79,014.02
Reason for Dispute	Board's Decision		
Defective Specifications	sustained		
Case Name	Case Number	Case Date	Department of Government
M&W Construction Corp.	53481	27 Mar 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
MAS Cherry Point NC	N62470-99-C-3619	\$817,510.00	\$171,681.50
Reason for Dispute	Board's Decision		
Equitable adjustment	dismissed in part / denied in part		
	--denied		
	--sustained		
Case Name	Case Number	Case Date	Department of Government
M&W Construction Corp.	53482	27 Mar 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
MAS Cherry Point NC	N62470-98-C-5322	\$0.00	\$188,373.00
Reason for Dispute	Board's Decision		
Equitable adjustment	dismissed in part / denied in part		
	--denied		
	--sustained		
Case Name	Case Number	Case Date	Department of Government
Charles G. Williams Construction Inc	49775	28 Mar 02	
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
	DADA03-92-C-0043		\$0.00
Reason for Dispute	Board's Decision		
Eichleay Claim?	denied		
Case Name	Case Number	Case Date	Department of Government
Eaton Contract Services, Inc.	54054, 54055	28 May 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Ft. Bragg, NC	DACA21-96-C-0009 & 95-C-0165	\$0.00	\$649,773.00
Reason for Dispute	Board's Decision		
Failure to cooperate	denied		
Case Name	Case Number	Case Date	Department of Government
A & D Fire Protection, Inc	53103, 53838	28 Oct 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Camp Pendleton, Ca	N68711-96-C3737	\$1,255,000.00	\$106,941.00
Reason for Dispute	Board's Decision		
Failure to cooperate	53103 - Dismissed, 53838 - Sustained		

Case Name	Case Number	Case Date	Department of Government
American Service & Supply, Inc.	49309, 50606	29 Apr 03	U.S. Air Force
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Tinker AFB, OK	F34650-94-C-0177	\$499,528.00	\$122,243.64
Reason for Dispute	Board's Decision		
Termination for Default	other (explain)		
Case Name	Case Number	Case Date	Department of Government
Wade Perrow Construction, Inc.	53021, 54018	29 Jan 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Selfridge ANG, MI	NAFEF3-98-C-0037	\$3,239,000.00	\$56,615.00
Reason for Dispute	Board's Decision		
Contract Interpretation	denied		
Case Name	Case Number	Case Date	Department of Government
Valenzuela Engineering Inc	53608, 53936	29 Jan 04	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
LeMoore, CA	N62474-97-C-1600	\$7,242,000.00	\$70,713.38
Reason for Dispute	Board's Decision		
Defective Specifications	denied		
Case Name	Case Number	Case Date	Department of Government
Ryste & Ricas	51841	29 May 02	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Ft Belvoir, VA	DADW35-97-C-0024	\$1,732,000.00	\$0.00
Reason for Dispute	Board's Decision		
Termination for Default	sustained		
Case Name	Case Number	Case Date	Department of Government
Huff Sealing Corp	53587	3 May 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Roosevelt Roads Naval Station, Puerto Rico	N62470-99-C-9207	\$0.00	\$0.00
Reason for Dispute	Board's Decision		
Government Delays	sustained		
Case Name	Case Number	Case Date	Department of Government
Fraya, S. E.	52222	3 Sep 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Naval Security Activity, Savana Seca PR	N62470-98-C-7085	\$1,378,600.00	\$0.00
Reason for Dispute	Board's Decision		
Termination for Default	denied		

Case Name	Case Number	Case Date	Department of Government
Taisei Rotec Corp	50669	30 Jan 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Okinawa, Japan	N62836-94-C-2545	\$0.00	\$0.00
Reason for Dispute	Board's Decision		
Damages	sustained, in part		
Case Name	Case Number	Case Date	Department of Government
Perini Corporation	51160, 51573	30 Jan 04	Dept of State Office of Foreign Buildings
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Caracos, Venezuela	S-54-FA-237	\$33,952,925.00	\$11,247,913.00
Reason for Dispute	Board's Decision		
Liquidated Damages Appeal	denied		
Case Name	Case Number	Case Date	Department of Government
P.R. Contractors	52937	30 Jul 02	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Paquemines Parish, Louisiana	DAXW29-97-C-0031	\$1,049,277.50	\$0.00
Reason for Dispute	Board's Decision		
Termination for Default	denied		
Case Name	Case Number	Case Date	Department of Government
Floor Pro, Incorporated	54143	30 Mar 04	U.S. Marines
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Albany, GA	N62467-02-M-2013	\$42,000.00	\$42,000.00
Reason for Dispute	Board's Decision		
Jurisdiction by subcontractor	sustained		
Case Name	Case Number	Case Date	Department of Government
PNL Commercial Corporation	53816	30 Oct 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Patrick AFB FL	NAFTJ3-00-C-0010	\$2,409,876.00	\$296,493.50
Reason for Dispute	Board's Decision		
Failure to cooperate	other (explain)		
Case Name	Case Number	Case Date	Department of Government
Walsh Construction Company of Illinois	52952	30 Sep 02	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Holbrook, Massachusetts	DACW45-89-C-0538	\$10,528,290.00	\$813,396.94
Reason for Dispute	Board's Decision		
Termination for Default	sustained/denied in part		

Case Name	Case Number	Case Date	Department of Government
Centex Construction Company, Inc.	51906, 51908	30 Sep 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Ft. Bragg, NC	DACA21-95-C-0007	\$190,977,335.00	\$124,600.00
Reason for Dispute	Board's Decision		
Scope determination	denied		
Case Name	Case Number	Case Date	Department of Government
Kilgallon Construction Company, Inc.	52582, 52583	30 Sep 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
DDRW Sharpe site, CA	DACA05-96-C-0026	\$9,411,846.00	\$295,406.00
Reason for Dispute	Board's Decision		
Differing Site Conditions/Contract Interpretation	other (explain)		
Case Name	Case Number	Case Date	Department of Government
W.B. Meredith II, Inc.	53590	31 Jan 03	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Naval Station, VA	N62470-99-C-5552	\$8,831,434.00	\$126,690.00
Reason for Dispute	Board's Decision		
Contract Interpretation	denied		
Case Name	Case Number	Case Date	Department of Government
M.A. Mortenson Co.	53431	31 Oct 02	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Elmendorf AFB AK	DACA85-94-C-0031	\$0.00	\$0.00
Reason for Dispute	Board's Decision		
Defective Specifications	denied		
Case Name	Case Number	Case Date	Department of Government
Manshul Construction Corp.	47797	4 Jun 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
NAS	N62472-84-C-0268, N62472-89-C-0071	\$0.00	\$0.00
Reason for Dispute	Board's Decision		
Bankruptcy Trustee Motion for Reconsideration	other (explain)		
Case Name	Case Number	Case Date	Department of Government
Black River Ltd Partnership	51754	5 Apr 02	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Ft Drum NY	DACA87-86-C-0059	\$0.00	\$0.00
Reason for Dispute	Board's Decision		
Failure to disclose vital information	sustained		

Case Name	Case Number	Case Date	Department of Government
parson's main Inc	51355	51717	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
St Louis, MO	DACA41-94-C-0103	\$38,400,000.00	\$8,733,427.00
Reason for Dispute	Board's Decision		
reconsideration	denied		
Case Name	Case Number	Case Date	Department of Government
Dillingham Construction Pacific	53284, 53414	6 Dec 02	U.S. Air Force
Basin LTD			
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Anderson AFB Guam	F6413-99-C-0006	\$12,464,595.00	\$0.00
Reason for Dispute	Board's Decision		
Liquidated Damages Appeal	denied		
Case Name	Case Number	Case Date	Department of Government
Fru-Con Construction Corporation	53544, 53794	6 Jun 03	Corps of Engineering
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Robert C. Bird Locks and Dam, OH	DACW69-93-C-0022	\$35,582,600.20	\$11,030,925.20
Reason for Dispute	Board's Decision		
Constructive Change	denied		
Case Name	Case Number	Case Date	Department of Government
DCO Construction Inc.	52701, 52746	6 May 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
NAS Pensacola FL	N62467-96-C-0761	\$3,604,100.00	\$402,456.00
Reason for Dispute	Board's Decision		
Government Delays	dismissed		
	--denied		
	--sustained		
Case Name	Case Number	Case Date	Department of Government
Elrich Contracting Inc.	50867	7 Aug 02	U.S. Navy
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Naval Research Lab Wash DC	N62477-94-C-0140	\$0.00	\$0.00
Reason for Dispute	Board's Decision		
Termination for Default	Denied		
Case Name	Case Number	Case Date	Department of Government
Singleton Contracting Corporation	51692	8 Aug 03	U.S. Army
Location of Performance	Contract Number	Dollar value of Contract	Dollar value of Claim
Army Reserve Ctr, VA	DACA65-93-C-0168	\$74,293.00	\$11,828.00
Reason for Dispute	Board's Decision		
Government Delays/T4C	other (explain)		

E. RESEARCH DATA BREAKDOWN

In this section, the researchers organize the data in the following methods:

- Number of claims per department of Government
- Court's Decision
- Value of Contract
- Value of Claim
- Reason for Dispute

The researchers separated the claims by the department of Government. This was done to determine if a trend could be determined by department of Government.

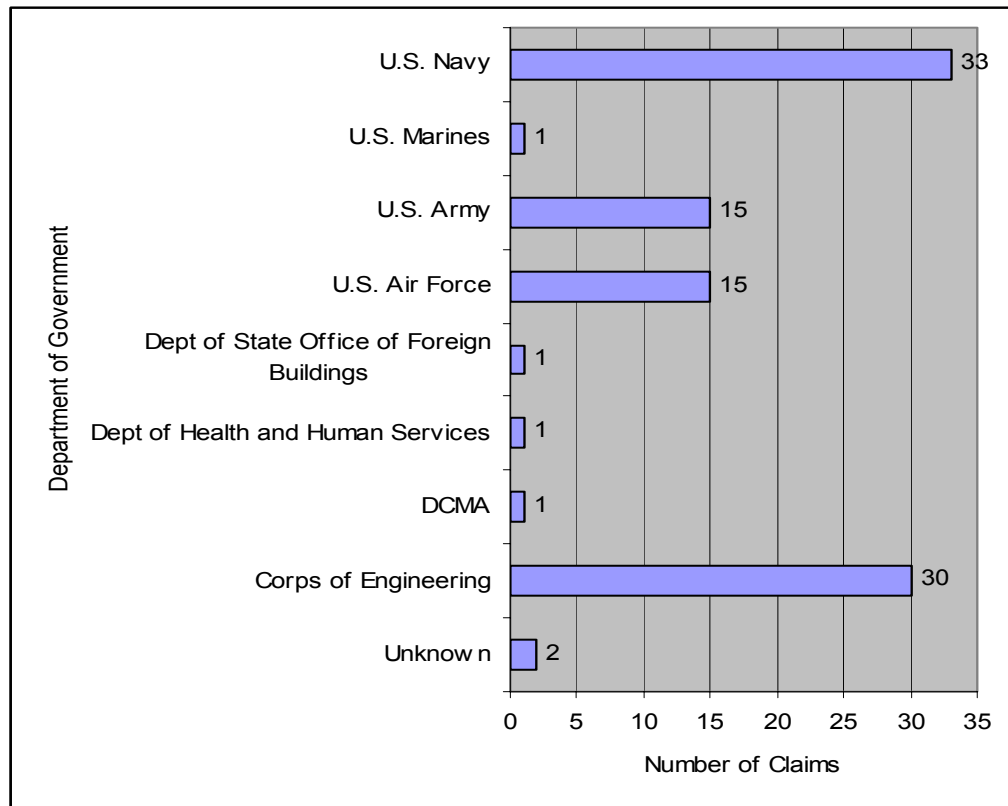


Figure 2: Number of Claims Separated by Department of Government

Source: Researchers

The researchers organized the data by the Court's decision. This is important to determine what percentage of claims was successfully appealed versus denied. This data provides an overview of the contractor's overall success rate of appealing the Contracting Officer's Final Decision.

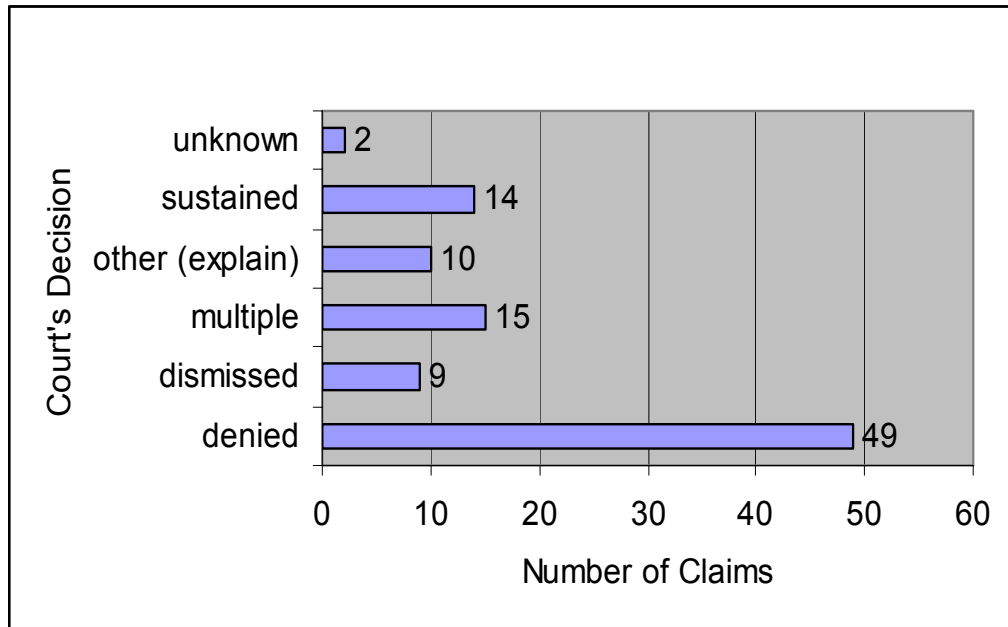


Figure 3: Number of Claims Separated by Court's Decision

Source: Researchers

The researchers also organized the data by value of the contracts and value of the claims. This is an important research tool to determine if a trend can be determined by the value of the contract. An important question to ask is whether more claims are filed for greater dollar value contracts versus smaller contracts. It is important to look at the value of the claim to determine if contractors are appealing high dollar disputes more often than low dollar disputes. .

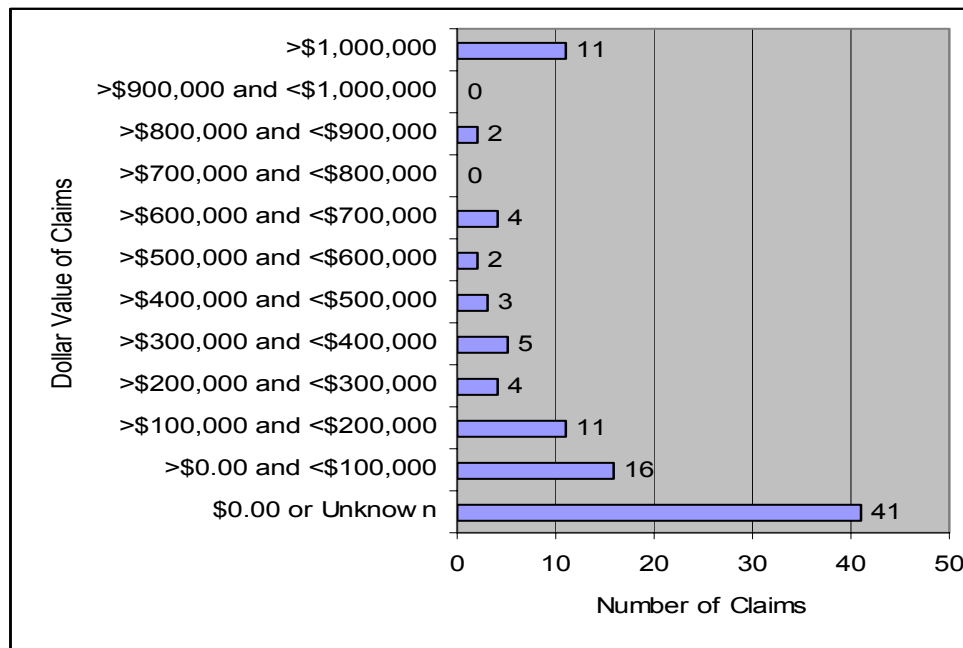


Figure 4: Number of Claims Separated by Dollar Value of Claims

Source: Researchers

Contract Value versus Number of Claims

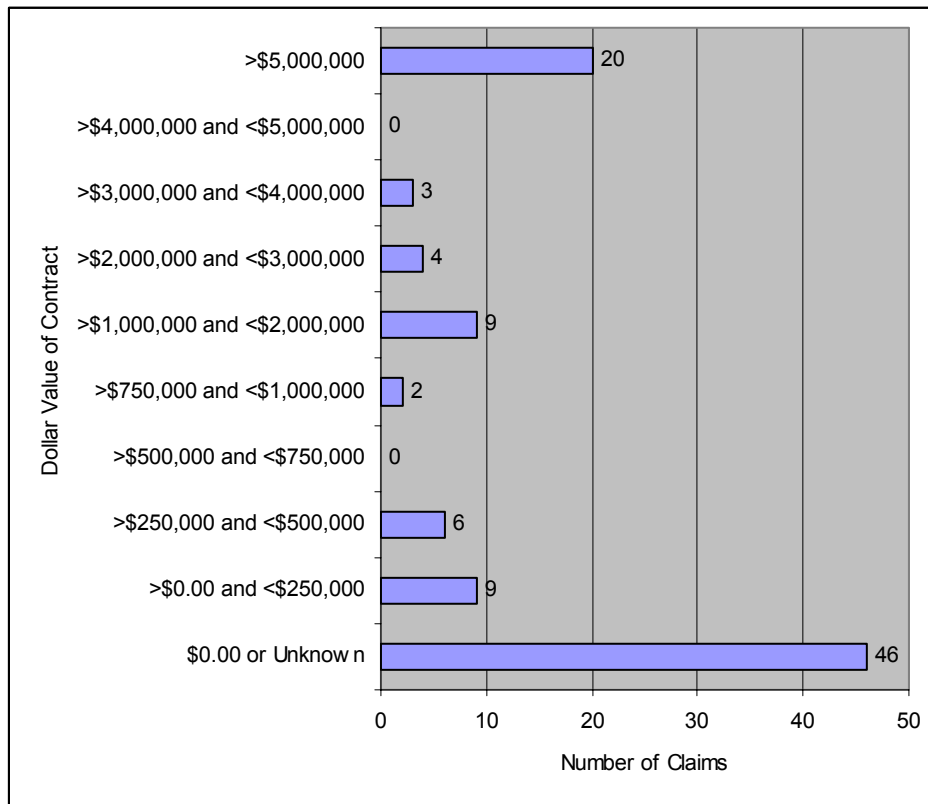


Figure 5: Number of Claims Separated by Dollar Value of Contract

Source: Researchers

Lastly, the data is organized by reasons for disputes. It is important to determine why contractors are submitting appeals to ASBCA. The researchers' analysis is focused on the trends in this last method of organizing data. The researchers' intent is to determine if any trends are visible in this category.

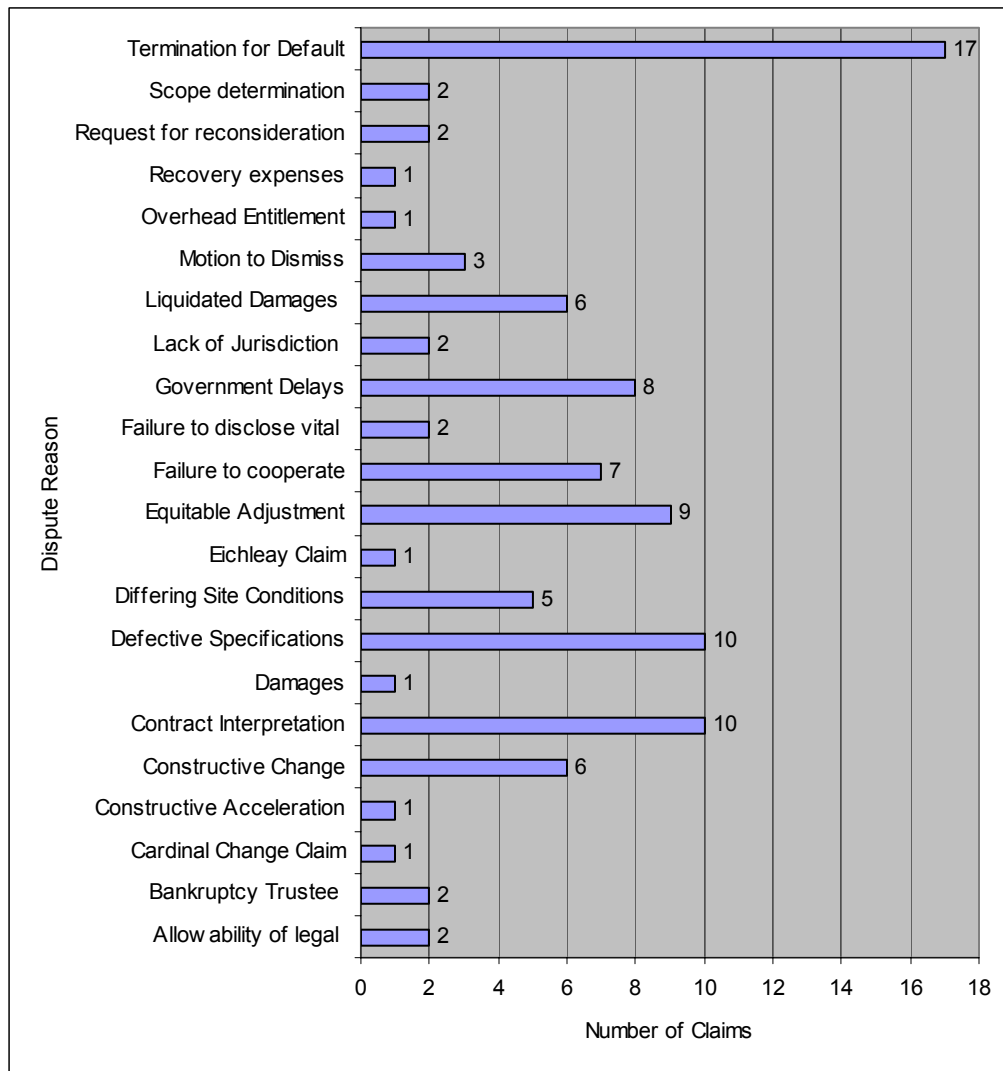


Figure 6: Number of Claims Separated by Reason for Dispute

Source: Researchers

F. CHAPTER SUMMARY

This Chapter presented the data the researchers utilized for this project. The chapter included location and description of data. It also included the methodology the researchers utilized to analyze the data. The chapter continued with information extracted from the ASBCA cases. The chapter concluded with presentation of data in several different formats.

In the next chapter, the researchers evaluate the data to determine trends in appeals submitted to ASBCA to include determining weaknesses and strengths of the Government and the Contractor.

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IV. ANALYSIS

A. OVERVIEW

This chapter discusses the researcher's analysis of reasons for the claims submitted to ASBCA. The researchers selected the following top three reasons for dispute: termination for default, defective specifications, and contract interpretation. The chapter describes each issue and provides a clear description of each reason, data comparison, and case analysis. The chapter continues with an overall trend analysis of construction contract claims. The chapter concludes with a description of the contractor's and the Government's strengths and weaknesses.

B. TERMINATION FOR DEFAULT

1. Description

Default is a contractor's unexcused present or prospective failure to perform in accordance with the contract's terms, specifications, or delivery schedule under Government contracts.

Termination for default is generally the exercise of the Government's contractual right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations. (FAR 49.401(a))

FAR clause 52.249-10 Default (Fixed-Price Construction) (Apr 1984) identifies the conditions that permit the Government to terminate a contract for default in fixed-price construction. Paragraph (a) states:

If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.

Grounds for termination include failure to perform on time, failure to make progress so as to endanger performance, and anticipatory repudiation.

The decision to terminate for default can be a discretionary act or by regulatory guidance.

a. Discretionary Act

The standard FAR clauses generally grant the Government the authority to terminate -- which shall be exercised only after review by contracting and technical personnel and by counsel, to ensure propriety of the proposed action. (FAR 49.402-3 (a)) The default clauses do not compel termination; rather, they permit termination for default if such action is appropriate in the business judgment of the responsible government officials. Contracting officers must exercise discretion.

Courts and boards review the contracting officer's actions according to the circumstances as they existed at the time of the default. A default termination is a drastic sanction that should be imposed only for good grounds and on solid evidence. The onus is on the Government to prove that a termination for default is warranted. When the Government has proven -- by a preponderance of the evidence -- the appropriateness of the default, the contractor has the burden of proof to show that its failure to perform was the result of causes beyond its control. Contractors may also challenge the default termination decision on the basis that the terminating official abused his discretion or acted in bad faith.

Failure to consider all information available prior to issuing a termination notice could be an abuse of discretion. Abuse of discretion (also referred to as "arbitrary and capricious" conduct) may be ascertained by looking at the following factors:

- (1) subjective bad faith on the part of the Government;
- (2) no reasonable basis for the decision;
- (3) the degree of discretion entrusted to the deciding official; and/or
- (4) violation of an applicable statute or regulation.

The contractor bears the burden of showing an abuse of discretion on the part of the Government.

Contractors asserting that government officials breached the contract by acting in "bad faith" must meet a higher standard of proof. The courts and boards require "well nigh irrefragable proof" of "malice" or "designedly oppressive conduct" to overcome the presumption that public officials act in good faith in the exercise of their

powers and responsibilities. Government officials are presumed to have acted conscientiously in making a default termination decision. Proof of bad faith requires specific intent to retaliate against or injure the contractor to support an allegation of bad faith.

b. Regulatory Guidance

FAR 49.402-4 provides detailed procedures, which the contracting officer should follow to terminate a contract. Contracting officers should consider alternatives to termination. The following, among others, are available in lieu of termination for default when in the Government's best interest:

- (1) permit the contractor, the surety, or the guarantor, to continue performance under a revised schedule;
- (2) permit the contractor to continue performance by means of a subcontract or other business arrangement; or
- (3) if the requirement no longer exists and the contractor is not liable to the Government for damages, execute a no-cost termination.

FAR 49.402-3 provides detailed procedures for terminating a contract for default. When a default termination is being considered, the Government shall decide which termination action to take only after review by contracting and technical personnel and by counsel, to ensure the propriety of the proposed action. Failure to conduct such a review, while risky, will not automatically overturn a default decision.

Before terminating a contractor for default, the contracting officer should comply with the pertinent notice requirements -- cure notice or show cause notice. (FAR 49.402-3(c)(d)(e)) Additional notice to the following third parties may be required:

- (1) Surety. If a notice to terminate for default appears imminent, the contracting officer shall provide a written notice to the surety. If the contractor is subsequently terminated, the contracting officer shall send a copy of the notice to the surety. (FAR 49.402-3(e)(2))

- (2) Small Business Administration. When the contractor is a small business, send a copy of any show cause or cure notice to the contracting office's

small business specialist and the Small Business Regional Office nearest the contractor. (FAR 49.402-3(e)(4))

A default termination is a contracting officer's final decision that can (and most likely will) be appealed. If a contractor succeeds in appealing the termination for default, the default is converted into one for the convenience of the Government. Termination for convenience allows the Government to terminate a contractor for any reason when it is in the Government's best interest. The contractor is entitled to compensation for any work done prior to the termination, together with earned profit. The termination for convenience clause is the contractor's best defense against a wrongful default termination.

2. Data Comparison

Terminations for default were the most cited reason for dispute in this analysis - approximately 17 percent of the evaluated claims.

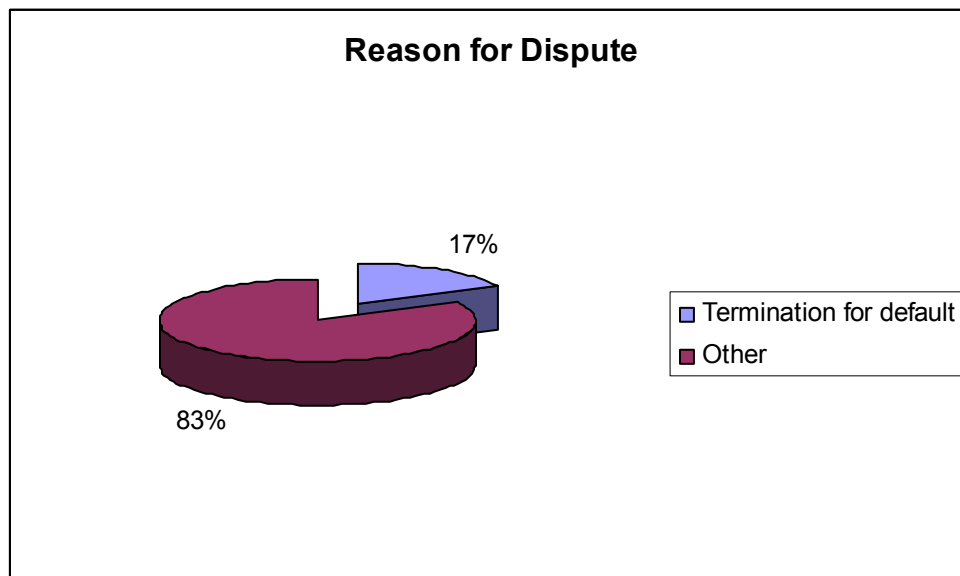


Figure 7: Reason for Dispute

Source: Researchers

Of the 17 termination for default appeals, 52% were denied, 24% were dismissed, 12% were sustained, and 12% were other (sustained in part and denied in part).

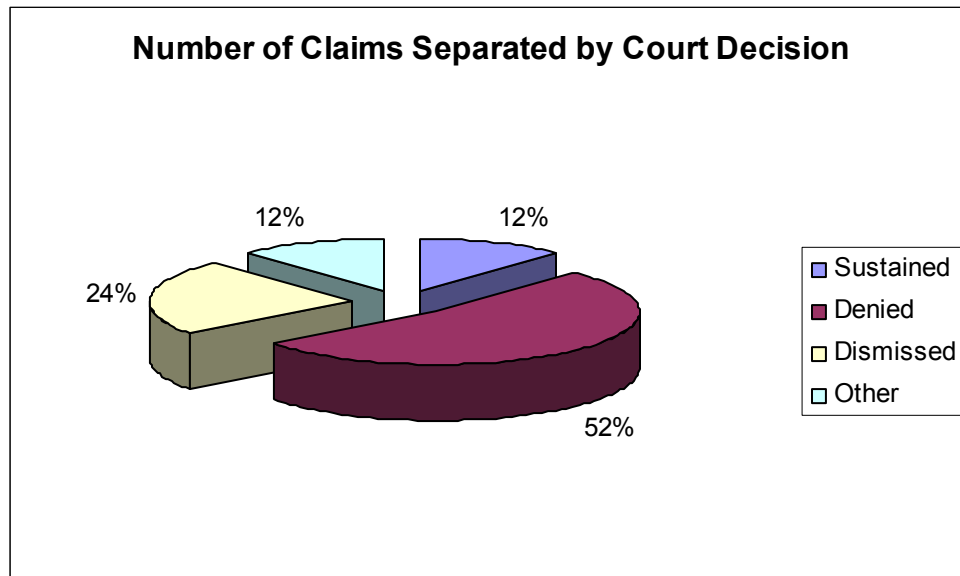


Figure 8: Number of Claims Separated by Court Decision

Source: Researchers

The following pie chart describes the breakdown by branch of service on the termination for default claims.

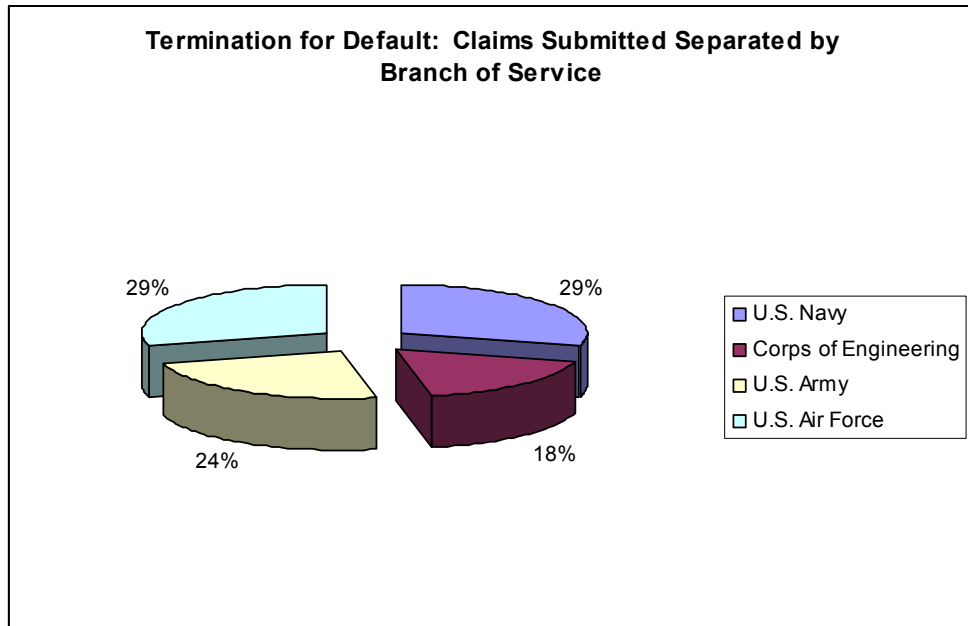


Figure 9: Termination for Default: Claims Submitted Separated by Branch of Service

Source: Researchers

The grounds for default termination are broken down into the following categories: failure to perform on time, failure to make progress so as to endanger performance, anticipatory repudiation and other (multiple grounds).

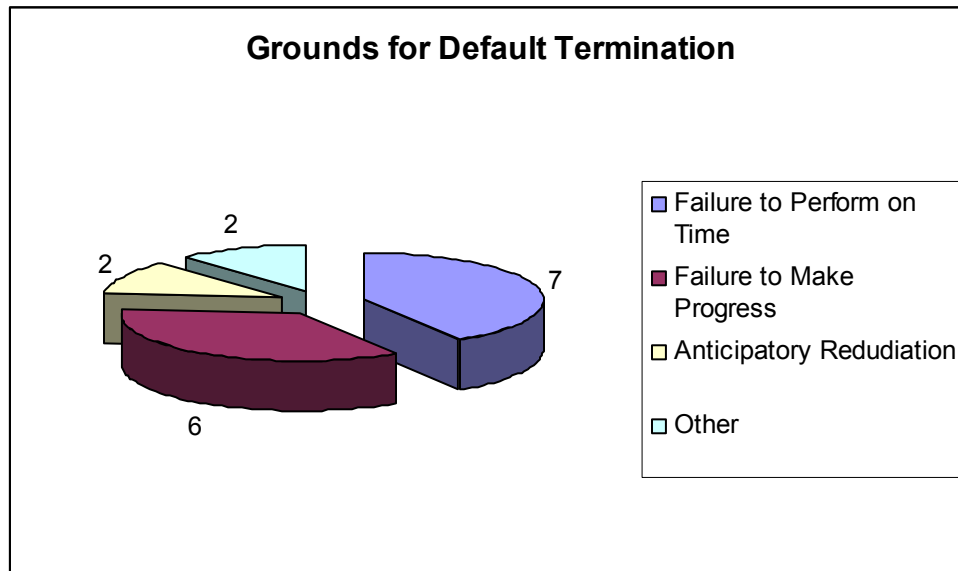


Figure 10: Grounds for Default Termination

Source: Researchers

3. Analysis

a. Failure to Perform on Time

(1) Failure to perform on time was the grounds for default termination in seven out of 17 claims. The following is a synopsis of one claim.

All-State Construction, Inc. ASBCA 50586: The Government accepted several revised completion schedules from All-State. On each occasion, the Government expressly stated that its acceptance of the revised schedule was solely for purposes of mitigating damages and without waiver of its rights to assess liquidated damages and terminate the contract for default at a later date. The contracting officer rejected All-State's progress payment invoice because the amount to be retained for liquidated damages exceeded the amount of the invoice. With the rejection of that invoice, the Government retained a total of \$127,198.67 (38 percent) from All-State's otherwise undisputed, earned amount for completed work. Ten days after the rejection of its invoice All-State stopped work on the contract.

(2) Rule

FAR 49.402-3(f) states that the contracting officer shall consider the following factors in determining whether to terminate a contract for default:

- a. The terms of the contract and applicable laws and regulations.
- b. The specific failure of the contractor and the excuses for the failure.
- c. The availability of the supplies or services from other sources.
- d. The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
- e. The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.
- f. The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.
- g. Any other pertinent facts and circumstances.

Failure of the contracting officer to consider factors stated in FAR 49.402-3(f) may result in a defective termination. The contracting officer must explain the decision to terminate a contract for default in a memorandum for the contract file. (FAR 49.402-5) The memorandum should recount the factors stated in FAR 49.402-3(f).

FAR clause 52.232-5 Payments under Fixed-Price Construction Contracts (Sept 2002) provides for periodic payments as work progresses based on the agreed percentage of work completed. Paragraph (e) of that clause provides that: "if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved."

(3) Lessons Learned

The Board sustained this claim. Generally, time is of the essence in all government contracts containing fixed dates for delivery or performance. Upon non-delivery of a contract requirement, the Government has an immediate right to terminate the contract. However, the Government's retention of 38 percent of All-State's earned progress payments was a material breach of the contract, which discharged All-State of its obligation to perform.

The retention of more than three times the maximum allowed by the FAR Payments clause was a material breach of the contract discharging All-State of

any further obligation of performance. This rather simple mistake is indicative of a contracting officer's failure to read and fully understand the clauses in the contract. Most clauses are incorporated by reference, and contracting officers are cautioned to read them rather than rely on institutional knowledge or experience. This is especially true for new contracting officers.

This claim could have been avoided if the contracting officer understood the Payments clause.

b. Failure to Make Progress so as to Endanger Performance

(1) Failure to make progress so as to endanger performance was the grounds for default termination in six out of 17 claims. The following is a synopsis of one claim.

Dae Shin Enterprises, Inc., d/b/a/ Dayron, ASBCA 50533: Dayron contends the termination for default should have been converted to one for the convenience of the Government since it expressly conditioned performance on the ability of its subcontractor -- Thiokol Ordnance Operations (Thiokol) -- to use Government property; and that the Government caused its failure to timely perform by interfering with the subcontractor's ability to use that property. The Government maintained that the Government property was always available for Thiokol's use and that Dayton's failure to timely provide the First Article was not excusable due to causes beyond its or its subcontractor's control and without its or its subcontractor's fault or negligence.

(2) Rule

The Government is not required to show that it was impossible for the contractor to complete performance. Rather, the contracting officer must have a reasonable belief that there is no likelihood that the contractor can perform the entire contract effort within the time remaining for contract performance. Prior to termination, the contracting officer should analyze progress problems against a specified completion date, adjusted to account for any government-caused delays.

FAR clause 52.249-10 Default (Fixed-Price Construction) (Apr 1984) provides for termination when the contractor refuses or fails to prosecute the work

or any separable part, with the diligence that will insure its completion within the time specified in the contract. Paragraph (b) of the clause provides that:

The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if the delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor... delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers.

(3) Lessons Learned

The Board denied this claim. Dayron failed to establish that its failure and refusal to perform were due to excusable causes beyond its or its subcontractor's control and without its or its subcontractor's fault or negligence, was caused by the Government's material breach, or that the contracting officer's exercise of discretion was unreasonable or arbitrary. Dayron's failure to timely provide the First Article submission and its refusal to perform unless its demands for an equitable adjustment in its contract price were agreed to by the Government established grounds for default.

FAR clause 52.233 Protests, Disputes, and Appeals Provisions and Clauses (July 2002), states:

The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

Dayron ignored the Disputes clause obligation to continue work and the contractually agreed-upon vehicles for seeking relief (*i.e.*, the Changes and Government Property clauses). This oversight by Dayron is indicative of a contractor's failure to read all clauses in the contract. The Disputes clause is usually incorporated by reference; however, it is the contractor's responsibility to find and read the clause in full text. This claim could have been avoided if the contractor had a clear understanding of the contract clauses. It is imperative that the Contracting Officer emphasize that it is the contractor's responsibility to read and understand all contract clauses.

c. Anticipatory Repudiation

(1) Anticipatory repudiation was the grounds for default termination in two out of 17 claims. The following is a synopsis of one claim.

Costruzioni & Impianti s.r.l, ASBCA 53853: A dispute arose between the parties concerning the responsibility for certain needed repairs. The Government directed Costruzioni & Impianti to make the required repairs. Costruzioni & Impianti refused to make the directed repairs and demanded the payment of the monies remaining to be paid under the contract. A final decision was issued by the contracting officer terminating the contract for default and withholding final payment.

(2) Rule

The government is entitled to strict compliance with its specifications. However, courts and boards recognize the common-law principles of substantial completion to protect the contractor where timely performance departs in minor respects from that required by the contract. If the contractor substantially complies with the contract, the government must give the contractor additional time to correct the defects prior to terminating for default.

Each party to a contract has the common-law right to terminate a contract upon actual or anticipatory repudiation of the contract by the other party. (Restatement (Second) of Contracts § 250; Uniform Commercial Code § 2-610) This common-law basis for default applies to all Government contracts, since contract clauses generally do not address or supersede this principle.

Anticipatory repudiation must be express. It must be absolute refusal, distinctly and unequivocally communicated. Anticipatory repudiation must be unequivocal and manifest either a clear intention not to perform or an inability to perform the contract.

(3) Lessons Learned

The Board dismissed this claim. A contractor's refusal to perform until the Government provides advance payments constitutes repudiation. Costruzioni & Impianti clearly communicated an absolute refusal to perform the needed repairs and demanded payment of the monies remaining to be paid under the contract.

This case provides a good example of a Contracting Officer's need to include the necessary clauses to protect the Government and clearly identify the requirements of the contract. This case is also an example of what might occur when lines of communication are broken.

It is sometimes impossible to prevent a claim, but through a better relationship between the Government and the contractor, it may have been handled at a lower level. As the contracting officer, it is important to develop and maintain a positive relationship with contractors. Communication between all parties is imperative. Establishing open lines of communications could have prevented this claim.

C. DEFECTIVE SPECIFICATION

1. Description

To describe defective specifications, it is important to understand the definition of specification. A specification is defined as “a detailed precise presentation of something or of a plan or proposal for something...a statement of legal particulars (as of charges or of contract terms); also a single item of such statement.” (Merriam-Webster Dictionary). Specifications are included in the solicitation for the contractor to provide a quote/bid.

The four types of specifications are design, performance, purchase description, and composite specifications. Design specifications provide precise measurements, quality control guidance, and other specific information. Performance specifications describe operational characteristics and the outcome desired. A purchase description provides an exact manufacturer and its model and part number. At times, a purchase description can include an “or equal” statement to provide the contractor some discretion. The last type of specification is composite specification. Composite specifications are the combination of two or more types of specifications.

The contractor is responsible for making a reasonable decision based on drawings and specifications. A defective specification occurs when:

...anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the

Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense.

The contractor is responsible for carrying out the intent of the specification. (FAR 52.236-21)

DFARS describes the contractor's responsibility in more detail. According to DFARS 252.236-7001, the contractor is responsible for checking the drawings and specifications. The contractor must notify the contracting officer immediately, if discrepancies are discovered. DFARS states that the contractor is responsible for any discrepancies that should have been found by reviewing the specifications and drawings.

The two theories for recovery under defective specifications are implied warranty and impracticability/impossibility. Implied warranty is for contracts containing design specifications. Impracticability and impossibility issues arise during performance of a contract -- when the contractor incurs unreasonable costs while attempting to conform to defective specifications in the contract.

2. Data Comparison

The researchers found ten out of the 99 evaluated claims were based on defective specification (approximately 10%). The total value of the ten claims was \$9,633,615.72. However, only approximately \$650,000 was awarded. The exact dollar value awarded to the contractor was unavailable since ASBCA submitted the claim to the contracting officer for quantum (ASBCA claims quite often are decided first on the merits of the claim without a finding as to quantum). The total value of the contracts was \$65,792,487.

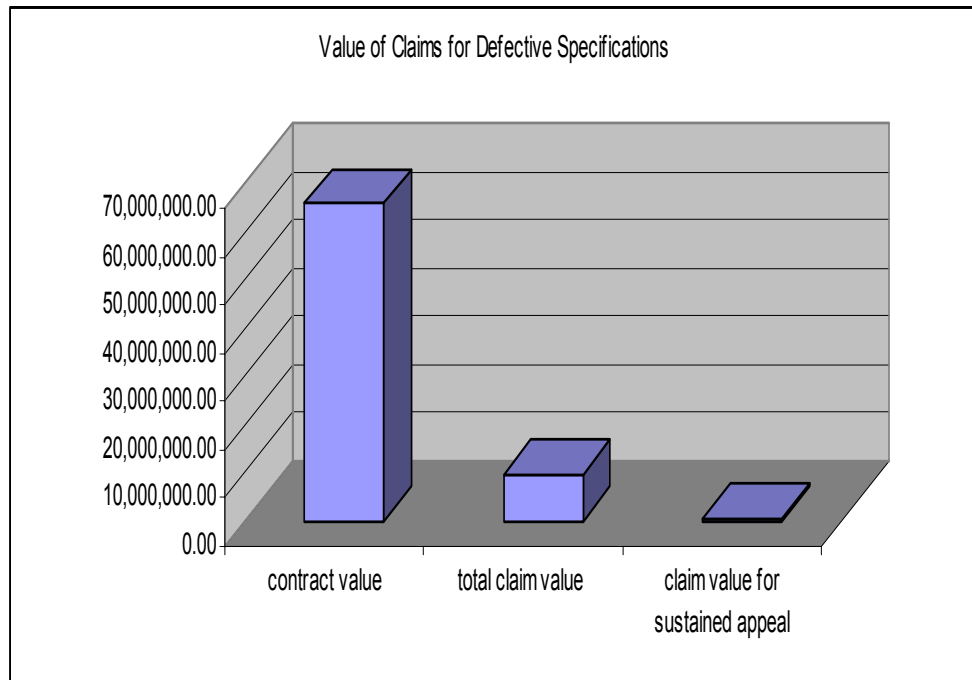


Figure 11: Value of Claims for Defective Specifications

Source: Researchers

Only 30% of the cases were sustained. The remaining seven claims were denied.

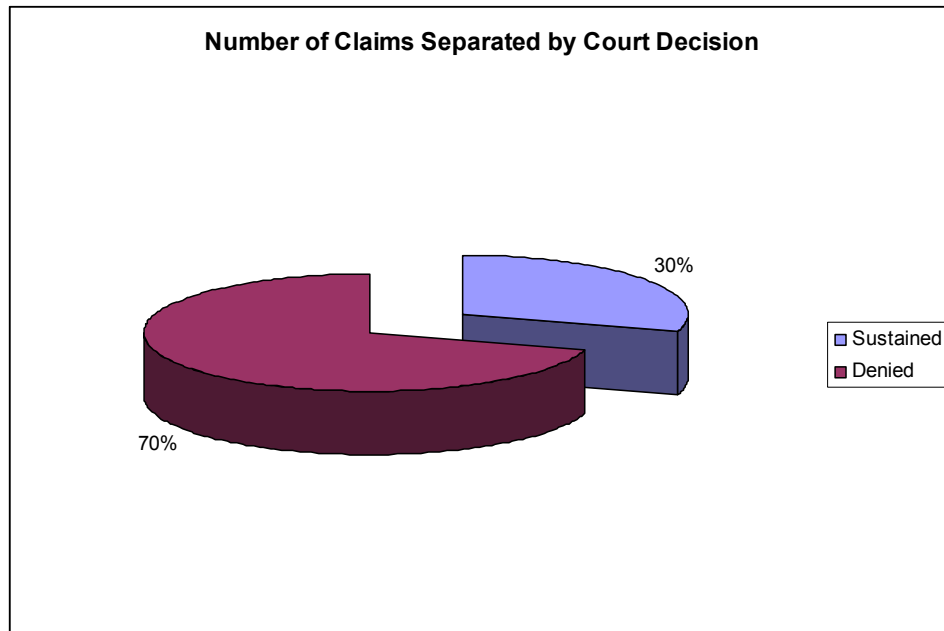


Figure 12: Number of Claims Separated by Court Decision

Source: Researchers

The following pie chart describes the breakdown by branch of service on the defective specification claims.

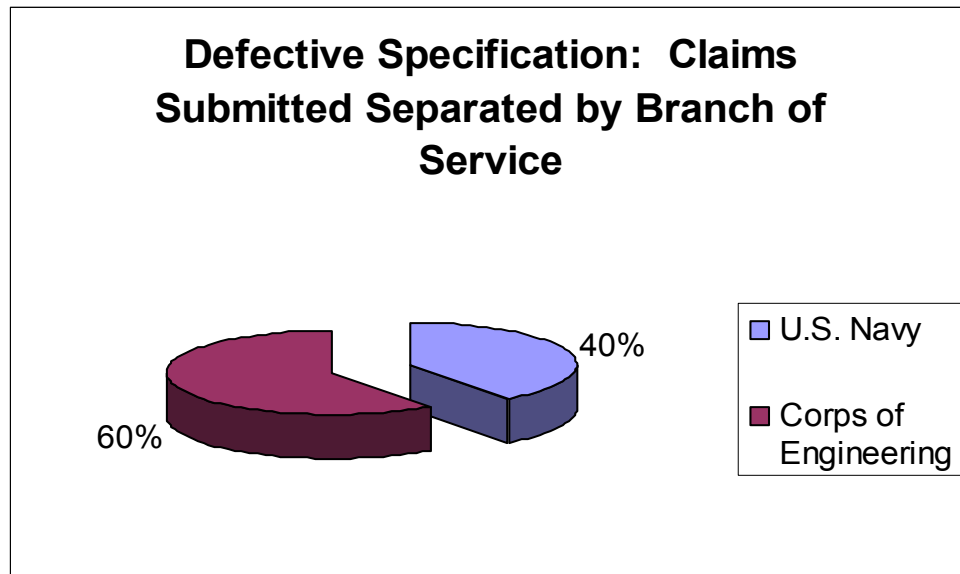


Figure 13: Defective Specification: Claims Submitted Separated by Branch of Service

Source: Researchers

3. Analysis

a. Valenzuela Engineering, Inc, ASBCA 53608

This appeal is for a work extension and equitable adjustment due to defective specifications for construction of a Type “C” magazine. The appellant utilized spliced sections to construct the magazine. The issue is whether the specifications were clear about the requirement or not. The appellant argues the following reasons citing defective specifications: interpretation of specifications, impossibility/impracticability of performance, and economic waste.

(1) Interpretation of specification: Does the contract contain defective specifications? The contract clearly states, “track sections shall not be spliced.” The actual writing of the contract states clearly the track shall not be spliced. It is unreasonable for the appellant to interpret the specification differently than the plain language of the contract.

(2) Impossibility/impracticability of performance: In order for the contractor to justify impossibility of performance, the contractor must demonstrate that the cost of performance of the required contract is much greater than anticipated and makes it commercially senseless to continue. There are several elements utilized to determine impracticability and impossibility. The first element is whether or not there was an unforeseen or unexpected occurrence. Would another contractor have been able to complete the project with the same requirements? What effort did the contractor make to follow the specifications? The second element is did the contractor assume any of the risk by agreement? The last element in determining impossibility or impracticability is to ask whether performance is commercially impracticable or impossible. It is important to note that there is not a universal standard for determining “commercial senselessness.”

In this case, the unspliced rails were readily available and could be easily transported. The contractor found the unspliced rails in only two days and was able to deliver them to the construction site with little effort. Impossibility/impracticability was not a legitimate argument for this case.

(3) Economic Waste: The last argument submitted by the appellant was for economic waste resulting from strict compliance of the contract. Economic waste cannot be argued for nonperformance of a contract. Economic waste is for limiting damages for repairing non-conforming work. The board determined that the appellant cannot argue that the variance utilized is “just as good” when public safety is an issue.

(4) Lessons Learned: Although the Board determined the specifications were timely, specific and unambiguous, the contractor still submitted a claim requesting equitable adjustment. It is sometimes impossible to prevent a claim, but through a better relationship between the Government and the contractor, it may have been handled at a lower level. As the contracting officer, it is important to develop and maintain a positive relationship with the contractors. Another important point is to establish open lines of communications. During a preconstruction meeting, the importance of unspliced rails could have been communicated to the contractor. This claim could have been prevented by better communication between the contracting

officer and the contractor. Although there was no information in the Board decision, it appeared that the parties took irreconcilable positions without any flexibility. Had the contracting officer tried to establish a “partnering” relationship, the expenses and difficulty associated with the litigation process could have been avoided. Contracting officers are more than mere representatives of the Government; they are business managers that should work with contractors to obtain better results for all concerned.

b. Wilco Construction, Inc, ASBCA 53683

Wilco submitted an appeal based on defective specifications. The appeal was for temporary library books storage. The specifications stated the contractor would be responsible for all costs associated with moving and storing the library books at a temporary location during renovation of the library. The contract was awarded to Wilco for \$3,403,520. The disputed line item was priced at \$50,091 and the Government estimate for the line item was \$46,766. Wilco made a site visit with a mover experienced in relocating libraries. All 60,000 books were clearly displayed during the site inspection.

(1) Recovery under implied warranty: Wilco contended that not all the books were essential, that not all of the 60,000 books were shown in the drawing, that the specifications were defective, and that there was an inconsistency between the specifications and drawings. In order for the contractor to prove defective specifications, the contractor must demonstrate that he reasonably relied upon the defective specifications and complied with them completely.

The appeal was denied because the Board found that the specifications clearly stated the contractor was responsible to move and store all items. The Specifications and Drawings Clause (See Sec C.1) allows the contractor to assume the information is in both if something is mentioned in the specifications and not in the drawings. Failure to show all books on the drawing did not alleviate the contractor from following the specifications. The contractor was also responsible for estimating costs and general requirements after conducting the site visit.

Another point of interest is the contractor’s responsibility during a site visit. The library materials were clearly visible during the site visit. The

Government does not assume any responsibilities on the interpretations or judgments the contractor may have made while visiting the construction location.

(2) Superior Knowledge (Failure to Disclose Vital Information):

The Government is required to disclose all vital information regarding a contract action. Nondisclosure is considered a contract change. Elements of superior knowledge include: (1) the contractor, unaware of the vital information, performs on the contract and incurs increase costs or duration, (2) the Government knew the contractor had no knowledge of the vital information, (3) the specifications misled the contractor, and (4) the Government failed to provide the vital information. Breach of contract does not exist if the Government demonstrates that the contractor should have known the information. The contractor has the burden of proof to justify superior knowledge. The contractor was unable to prove all four elements of superior knowledge.

(3) Lessons Learned: The contractor did not have a clear understanding of the Specifications and Drawings clause. It is important for the contractor to understand the specifications of the contract. The contractor should have asked for clarification regarding the moving and storage of the library books. The contractor also needed to clearly understand the Site Investigation clause. A claim could have been prevented if the contractor had a clear understanding of the contract clauses.

This case provides a good example of a contracting officer including the necessary clauses to protect the Government and clearly identifying the requirements of the contract. As a contracting officer, it is important to understand each clause included in the contract. Most contracts contain clauses incorporated by reference. This does not alleviate the Contracting officer of the duty to clearly understand the clauses. Since there was a considerable difference in the drawings and specifications on the number of books to transport, it should have been discussed during the preconstruction meeting. Although the claim was denied, the CO should review the specifications and drawings to ensure the requirements are clearly stated.

c. Moore & Cowart Contractors, Inc, ASBCA 54014

The contract was awarded for construction of a series of basins and waterways to prevent flooding. The drawings and specifications provided ambiguous

requirements. The specifications referenced a drawing to determine the footing rebar requirements. The Government rejected the contractor's submittal for the project indicating improper footing rebar and required the contractor to adjust the footing rebar according to their requirements. The contractor sent a reply stating the changes would incur additional costs, and that they would seek compensation for such.

(1) The drawings and specifications were unclear. The references indicated some changes, however, the references were not consistent throughout the requirements. The specifications were considered defective. The appeal was sustained.

(2) Contract interpretation is also a clear argument for this case (See Section D.1). The Board determined the contractor's interpretation of the requirement was the only reasonable interpretation. The Government failed to prove its interpretation because of the multiple discrepancies in the drawings and specifications. The Government claimed the contractor could not receive compensation because it was not able to demonstrate reliance at time of bid. However, the Government's claim is not feasible since it is only valid when the contract is ambiguous. The Board determined the contractor had the only reasonable interpretation, so proof of pre-bid reliance was not required.

(3) Lessons Learned: The specifications provided ambiguous requirements that are subject to contract interpretation. It is important for the Government to clearly state requirements. Under the legal doctrine of *Contra Proferentum*, the drafter of the contract bears the burden of stating the requirements. It is imperative to ensure the specifications and drawings are clear. What type of review process did the specifications go through? Did the reviewers understand the requirements? Sometimes, it is important to have someone other than the drafter of the specifications to read the requirements.

Of particular note, the value of the claim was only \$13,000! Compared to the value of the contract of over \$3 million, the claim bordered on ridiculous especially given the costs of litigation. This issue should have been resolved quickly between the Government and the contractor. Communication between the two parties is extremely important. As a contracting officer, it is important to resolve at the

lowest level. Did the contracting officer try to resolve this matter in-house? Was ADR considered for this case? These are questions we may never have an answer to. However, they are questions that we must ask in every dispute case.

d. DD-M Crane & Rigging, ASBCA 53881

The contract was awarded for approximately \$1.3 million for one mile of levee reconstruction. During the reconstruction process, changes at the site were found. An unpriced modification was accomplished to allow the contractor to continue with the change in site conditions. The contractor accepted the equitable final adjustment of \$300,000, but stated, “Even though the settlement offered from the Corps is considerably less than the dollar amount that DD-M requested.” Two months later, the contracting officer submitted a unilateral modification for a \$79,000 to adjust changes in estimated quantities. The contract contained the variations in quantity clause.

(1) The appeal concerns interpretation and requirements set forth in the modification for \$300,000. The contractor claimed the \$300,000 was for settlement of the entire contract while the Government claimed it did not include the adjustments needed for the variations in quantity. The “clear” wording of the modification states the adjustment is for the change in site conditions. The contractor also argued that the Government did not accurately calculate the changes in quantity. However, the contractor did not submit any additional information regarding this dispute. The Board denied the appeal except for quantity adjustment. The Board remanded the change in quantity to the contracting officer for both parties to negotiate.

(2) Lessons Learned: This is another clear example of broken lines of communication. It is important to ensure that both parties understand each modification and their limits. How experienced was the contractor in working with Government contracts? Did the contractor clearly understand the Variations in Quantity clause? As a contracting officer, it is important to educate the contractors with the uniqueness of Government contracts. During the preconstruction meeting, it is important that the contractor understand the unilateral rights of the Government. The contractor argued the quantities were incorrectly calculated. Did the Government clearly state how

these quantities would be determined in the contract? Did the contractor understand how the quantities would be calculated?

e. M.A. Mortenson Company, ASBCA 53431

The appeal was regarding the contractor seeking an equitable adjustment due to the Government requiring installation of manual balancing dampers in the distribution zone. The Government claimed the specifications clearly stated a manual damper is required at each point where a duct connected to a larger duct in the entire duct system. The contractor claimed the contract did not clearly indicate this requirement. The contractor claims the contract states “at points” not “at each point” or “at all points”.

(1) Impracticability: The contractor determined the number of dampers required by analyzing the contract drawings. When the contractor requested clarification by the contracting officer, the contracting officer indicated that the dampers were required in all locations including those mentioned in the specifications. In order for the contractor to install the additional dampers, the contractor had to cut and remove already installed ductwork. The appeal was denied because the Board determined the drawings, in fact, did clearly demonstrate requirements of the dampers. It was not impracticable to install the dampers. The Government was allowed to require “strict” compliance.

(2) Lessons Learned: Although the appeal was denied, this case had several examples for areas of improvement. A Government engineer opined that the dampers were not needed at all locations. Although this was not relevant for the contractor’s case, it is important when discussing the cost of the contract. As a contracting officer, it is important to contract for the minimum needs of the Government. A contracting officer must ask whether the requirement is an actual need versus a “nice to have” requirement. Another important fact to note is why the Government engineer is speaking for the contractor. If the engineer felt that the dampers were not needed, did he discuss this during the drafting of the specifications and drawings? It is important for the Government to have one voice; otherwise it can mislead the contractor.

f. C. Pyramid Enterprises, Inc., ASBCA 53626, 53627

The contractor appealed the contracting officer's final decision on two requests. The first request was for \$34,013 for defective specification regarding the compressive strength of masonry units. The second request was for \$82,291 for defective specifications regarding the truss system and conflict between the specifications regarding truss work and the ductwork. The original contract was awarded for over \$14 million.

(1) Defective specification for Masonry (ASBCA 53626): The submittal, with regards to the masonry, was rejected by the Government due to insufficient compressive strength. The contractor replied to the rejection by stating the specifications were "confusing and misleading". The Government admitted the specifications were "somewhat confusing". The contracting officer proposed a change to the specification and requested additional funding from Southern Division Naval Facilities (SDFC). However, the funding was denied. The SDFC responded that the specifications correlated with the requirements and additional funding would not be provided. The required masonry blocks were not readily available, so the contractor was required to purchase 4,000 psi blocks when only 2,800 psi was required.

The contractor claimed the specifications were defective due to ambiguity in the writing, the ambiguity was latent, and the contractor's interpretation was reasonable. The contractor asserted that the Government was liable due to contra proferentem (See Section D.3.C). The issue the Board determined was whether or not the ambiguity was patent or latent. A patent ambiguity is described as one that is glaring and obvious, while a latent ambiguity is not as obvious. For contra proferentem to apply, it must be a latent ambiguity. The Board found the ambiguity to be patent. The contractor, then, had a duty to inquire about the information. The appeal was denied.

(2) Impracticability/Impossibility Truss System (ASBCA 53627): During the pre-bid conference, a question was asked about whether the specification for the metal truss was a performance specification or not. It was indicated that it was a performance specification. The contractor found the only cold formed truss system was proprietary and were not considered "metal studs" as described in the contract's

specifications. The contractor submitted a design that differed from the contract drawings explaining the differences. The Government rejected the submittal without review. The contractor then requested the Government show how they calculated the contract design to be implemented. The Government's A/E stated that it had not completed the calculations and was not sure if they could produce them or not. This was clearly a problem between the A/E firm and the construction contractor. The contractor felt it was "virtually impossible" to complete as designed by the A/E firm. The contractor must prove that if it had followed the contract design, it would have been substandard, unsafe, and likely to fail. The contractor also claimed the drawings misled the bidders on a space issue for the roof truss system.

The contractor claimed that the Government provided strict guidance, thereby, making it a design specification not a performance specification. If the specification remained a performance specification, then the Government would not be held liable. Although the contractor made several claims regarding the specifications, he did not meet the burden of proof regarding the conflict and errors in the design portion or describing the impossibility/impracticability of the specifications. The appeal was denied.

(3) Lessons Learned: It is important to have one voice when speaking for the Government. Although the contracting officer agreed the specifications were confusing, their higher headquarters (SDFC) did not. The contracting officer should not have communicated his decision with the contractor until he knew he would have the support of higher headquarters. Another issue is the value of the claim. Again, the value of the claim is minimal compared to the total contract value. This claim should have been resolved between the Government and the contractor. Another issue is the conflict between the A/E firm and the construction contractor. It is important to ensure the A/E firm designs a project clearly for the construction contractor to understand. It is imperative to have a good working relationship between the Government A/E and the construction contractor.

g. Parsons Main, Inc., ASBCA 51355, 51717

This appeal is regarding the contracting officer's final decision for over \$8 million due to a negligent facility foundation design (ASBCA 51355) and the contractor's claim for \$545,952 for redesign services (ASBCA 51717). Both appeals were sustained. This claim was submitted for reconsideration, and the appeals were sustained except one minor change. The minor change did not change the Board's decision.

(1) Defective design claim (ASBCA 51355): In order for the Government to prevail on this claim, it must prove (1) if the construction contractor substantially complied with the A/E's design in the manner intended by the A/E, (2) if the A/E exercised skill, ability, and judgment negligently instead of reasonable care, and (3) if the defective design was the cause of damage to the Government. The Board found that the construction contractor substantially complied with the requirements for excavating the pier. On the second point, the Government claimed that the A/E firm did not exercise its ability with the local standard. However, the Board applied the national standard of care and rejected the use of the local standard based on previous case law. Also, an expert witness contended the design was very conservative. This does not prove negligence by the A/E firm. The Government did not meet its burden of proof regarding defective design claim. The appeal was sustained.

(2) Equitable Adjustment (ASBCA 51717): The contractor completed redesign services as requested by a modification completed by the contracting officer. Since the Board sustained the above appeal, the contractor's appeal was sustained and remanded for determination of quantum.

(3) Lessons Learned: The Government did not prove its case. The Government even appealed the decision unsuccessfully. The amount of time and money spent on this case was phenomenal. The Government should have done more research to determine the strength of its case. Before submitting for reconsideration, the Government should have looked at the facts. The Board had determined a majority of the points were repeated from the original case. The Board only evaluates new information. Although it is important to look out for the best interest of the Government, it is just as important for a contracting officer to know when to concede.

h. The Ryan Company, ASBCA 53385

The contractor claimed \$136,865 for drilling a fourth well with a contract awarded for a sewage treatment, transmission, and disposal system. The original construction contract included drilling three effluent injection wells. The contractor makes several arguments to seek compensation for drilling the fourth well.

(1) Normal Trade Practice: The contractor claims that a typical well design is considered preliminary and is expected to change in the field by a geologist. In order for this argument to be considered, the contractor must prove that he reasonably relied on this interpretation during the bidding process. The contractor did not submit bid documents to the board for review, and he did not prepare an independent estimate. This argument failed to meet the burden of proof.

(2) Conflict between drawings and specifications: The contractor used a report that was not a part of the contract to interpret the specifications differently than as written. When the specifications are read as a whole, there is not a conflict between the drawings and specifications. This argument failed.

(3) Project engineer authorized the change: The Board found that the project engineer, in fact, did not authorize the contractor to use 250 feet of well screen. However, even if the project engineer had authorized the change, the project engineer is not authorized to bind the Government; only the contracting officer can do so. This argument failed.

(4) Commercially unreasonable: As described in Sec3.A.2, there is not a universal method to determine commercial senselessness. The Navy could have required the contractor to drill three new wells or add additional well screen to the existing wells to meet the required specifications. Both of these solutions would have been more costly to the contractor. The contracting officer proposed a viable solution to mitigate the damages incurred to the Government. This argument failed also.

The appeal was denied based on the previous four arguments and several others.

(5) Lessons Learned: This case is a great example of the Contracting Officer proposing a viable solution for a large problem. However, as with the case, the contractor did not assume responsibility. It is important to understand that as a contracting officer, you may come up with a good solution, but it may not always be taken with open arms. It is also important that the contractor understands the unique circumstances when working with the Government. The contracting officer must ensure he communicates who is authorized to make changes to the contract. Miscommunication seemed to be prevalent throughout the case. As with many earlier cases, communication is extremely important.

i. Randolph and Company, Inc., ASBCA 52953

The contractor submitted seven different claims regarding this contract. The researchers only looked at one claim under defective specifications. The original contract was for construction of a dike. Randolph did not have experience in constructing dikes. However, the contractor claimed experience in working with wet, marshy soil conditions during adverse weather. The contract site was on top of a marsh.

(1) Weather Delay as a defective specification: The contractor argued that it is due a time extension and compensation due to adverse weather. The contractor claimed that the contract predicted 36 days for performance, but was allowed 91 days due to weather related delays. The contractor argued that it rained more than the historical average projected, so the projected performance period was defective. The norm in construction contracts as related to weather delays is excusable, non-compensable delay time and relief from being assessed liquidated damages. The contractor assumes some risk when proposing on a contract. The Board determined that there was not a reason to depart from the above normal standard. The Board determined the time extension the contracting officer gave the contractor was more than reasonable. Additional compensation was denied.

(2) Implied Warranty: The contractor claimed that the specified performance period implied that it was possible for the contractor to complete the work. The Board determined that the specified performance period is not a warranty by the Government as presented in earlier case laws with a completion date for construction of a

ship. It is the contractor's responsibility to determine its own capabilities and make a determination whether it can finish within the required performance period. The Board determined that the burden of proof of demonstrating impracticability was not met. This argument failed.

(3) Superior Knowledge: As described in Section B2, the contractor must prove four elements to demonstrate merit on a superior knowledge claim. The Board determined the contractor was unable to demonstrate that the Government knowingly withheld vital information. The Board determined that the contractor took an acceptable level of risk and could not seek compensation with occurrence of the risk.

The claim was denied. The contractor submitted an appeal for reconsideration regarding the superior knowledge claim. However, the contractor did not present any "newly discovered evidence or legal theory", so the Board affirmed its original decision.

(4) Lessons Learned: The Government did have additional information regarding the area of concern for the contractor. Although the Board found substantially similar information in the contract, it might have been helpful to provide the same report to the contractor during the preconstruction meeting. This claim, again, reflects miscommunication between the Government and the contractor. Also, it is important to educate the new contractors on the unique situations when working with the contractor. It is important that the contractor understands each and every clause in the contractor.

D. CONTRACT INTERPRETATION

1. Description

Contract interpretation claims occur when two separate parties understand a requirement differently. Although a requirement may seem clear to the drafter of the requirement, another party deciphering it may not understand it the same way. When litigation under these pretenses goes to court, the courts apply a set process by which they must determine proper interpretation.

There are three main issues a court must address when applying contract interpretation principles. First, is the Government's interpretation originated from an

employee with authority? This rule is paramount when deciding fault because only warranted Contracting Officers can speak on behalf of the government and give direction to contractors. If other government officials give directions, the contractors are not required to perform the request. Secondly, did the contractor perform work that the contract did not require? And lastly, did the contractor timely notify the Government of the impact of the Government's interpretation? It is the contractor's responsibility to seek clarification from the government to clear up any ambiguity.

2. Data Comparison

Contract interpretation is tied for the second most frequently disputed causes for claims in this analysis. Approximately 10 percent of the evaluated cases were for contract interpretation. The researchers found ten out of the 99 evaluated claims. The total value of the ten claims regarding contract interpretation was \$777,269.03. However, only one claim for approximately \$67,102.54 would be awarded. The exact dollar value awarded to the contractor on the other three claims was unavailable since ASBCA submitted the claim to the contracting officer for quantum. The total value of the contracts was \$44,985,535.

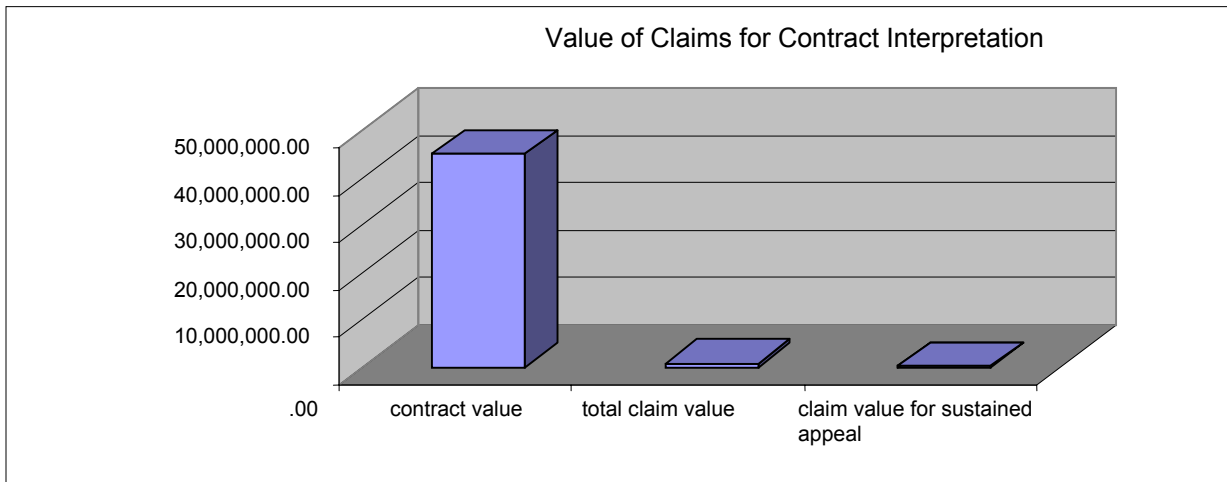


Figure 14: Value of claims for Contract Interpretation

Source: Researchers

Of the ten claims in this category, one was sustained, six were denied and the other three were split with a ruling of sustained in part and denied in part.

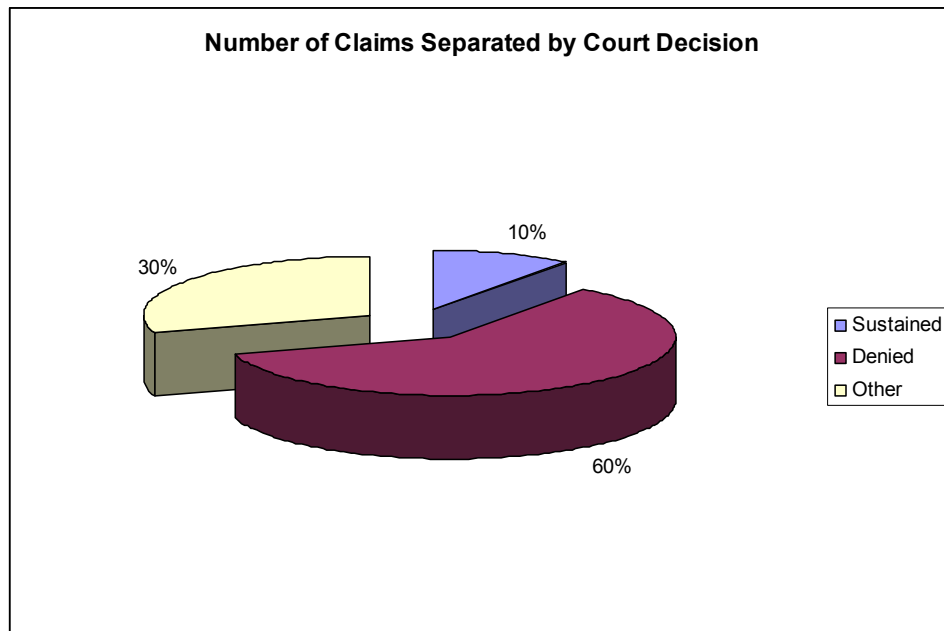


Figure 15: Number of Claims Separated by Court Decision
Source: Researchers

The following chart describes the breakdown by government agency on the contract interpretation claims.

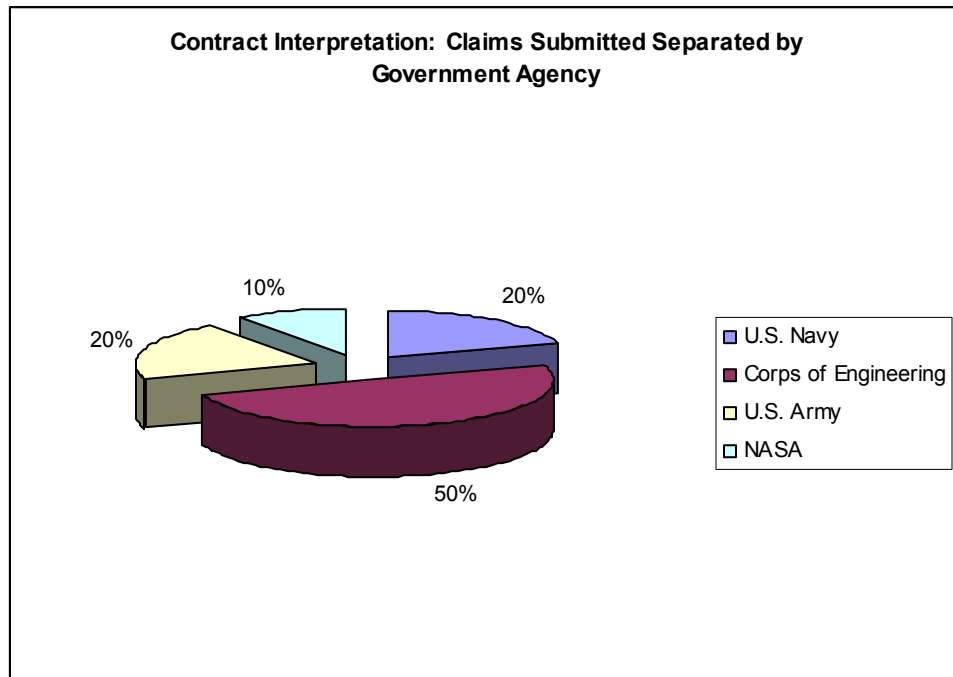


Figure 16: Contract Interpretation: Claims Submitted Separated by Government Agency

Source: Researchers

3. Analysis

a. Disagreement Over Contract Requirements

When the Government awards a contract, both parties are agreeing to perform all aspects of the contract. However, there are times when disagreements arise between the parties over what tasks are to be accomplished. Our research identified five of the ten claims resulted in a disagreement over contract requirements. Following is a brief synopsis of each case.

Wade Perrow Construction (WPC), Inc ASBCA 53021, 54018: WPC brought two separate claims against the Government requesting \$28,619.26 and \$27,996.02 respectively for first providing a catch basin and drain line for an overflow parking lot and secondly for improving the drainage system on the south side of the construction site. WPC believed that the work was beyond the scope of the contract. The

Government argued that WPC was required to provide the catch basin and drain line in order to meet specifications within the contract.

The court ruled, “in providing the catch basin and drain line, WPC did no more than what was required to meet the design criteria in the contract”. Also, language existed in the contract that “made WPC responsible for locating and identifying all existing underground services and utilities within the contract limits” which nullifies the claim for improving the drainage system. Claim was denied.

Sherman R Smoot Corp ASBCA 52173, 73049, 53246: Smoot Corporation brought a claim stating the Navy’s renovation design contract did not set forth the air cleaning requirement after removal of lead based paint. The contract did not spell out exactly what the dust standard should be; instead, it required the contractor to comply with any federal codes and regulations. Due to differing guidance within the federal codes and regulations, the contractor requested clarification. The contractor requested clarification by the project engineer and not the contracting officer. The engineer was not the contracting officer and did not have the authority to direct the contractor. Although, the contracting officer did not give the direction, he was addressed and aware of the request for information letter from the contractor and of the response of 200 g/ft generated by the engineer.

The court ruled that the contracting officer had knowledge of the direction and did not prevent it; therefore, the court interpreted this as a constructive change. The board sustained the appeal to the extent of the Navy’s direction to clean accumulated lead dust to the 200 g/ft criterion and remanded back to the contracting officer for his action. This case shows that a contracting officer must be proactive, especially when other government officials provide information.

Arnold M. Diamond (AMD), Inc. ASBCA 53724 & 53725: AMD was awarded a contract to demolish an old boiler plant and morgue as well as steam lines on Fort Bragg, NC. AMD submitted a claim in the amount of \$81,594.94 due to their interpretation that the removal of valve pits was not required according to the contract. They claimed that the first sentence of paragraph 1.2 relating to the demolition of the buildings limited the demolition of the valve pits within the two buildings. In the second

portion of this claim, AMD stated that the Government's denial of allowing them to use the demolished valve pits as fill is a change to the contract. The second claim by AMD stated that the Government's scale on the contract drawings inaccurately depicted the number of feet of steam pipe to be demolished.

The Board found on claim 53724, the contractor was required by the contract to perform demolition of the valve pits. It stated, "section 01005 of the contract specifications states 'remove asbestos in existing pits and demolish as shown on drawings'". The contract also depicted 21 valve pits under the "Steam line/valve pit demolition" block of the contract drawings. Therefore, the contract clearly required the demolition of the valve pits and removal of the asbestos. However, the Board found that the Government's refusal to allow AMD to use the demolished pits as fill was a change to the contract. Therefore, the claim was denied in part and sustained in part.

On ASBCA 53725, the Board found the contractor erroneously interpreted the contract language stating, "The drawings are not to be scaled" and "Do not scale drawings" are held to allocate the risk of an error in the scale on a contract drawing to the contractor. Claim was denied.

Dawkins General Contractors & Supply, Inc ASBCA 48535: Dawkins was awarded a time-and-materials task order contract as described by the Government. It was designed as a fixed price for labor cost; however, cost reimbursement for materials and equipment. The labor costs were to be negotiated at time of delivery order. Dawkins asserted that due to numerous contract provisions applicable to fixed-price contracts and the alleged absence of time-and-materials and cost reimbursement provisions, established the contract as a task order fixed-price contract. The contracting officer admitted there were erroneous clauses and provisions included in the RFP and contract; however, it was due to the computer "spitting out" the clauses automatically. Therefore, the contract had clauses that referred to a fixed priced, time-and-material and cost reimbursement contract. Most of the clauses included referred to a fixed price type contracts.

The Board found that when the RFP was initially solicited, it was advertised as a time-and-material task order not fixed price contract. Secondly, if the contract was read as a whole, the view shows the contract as a time-and-materials

contract. Even though numerous appropriate clauses were not included, the *Christian* doctrine incorporates all applicable clauses. The *Christian* doctrine provides a safeguard to Government procurement when they are inadvertently omitted. Therefore, the claim is denied. This case shows that a contracting officer must pay close attention to what is in a contract. The *Christian* doctrine saved the contracting officer, but that is not something that can be counted on.

HGM, Inc. ASBCA 53150: HGM was awarded a contract to remove approximately 4,000 cubic yards of debris located at Wheeler Army Airfield (WAAF), HI. They submitted a claim for \$11,687.50 stating they completed the contract requirements and demanded full payment of the contract value. The Government asserted that HGM did not complete the contract and, therefore, was withholding payment of the balance of the contract.

When HGM submitted its original bid, they were going to dispose of the debris on local farmland, and as screened soil on a local golf course. After submittal of its bid, HGM learned that the golf course needed to obtain a permit in order to dump the soil on the shoreline and getting this permit could take several months. Therefore, HGM contacted the horse stable, located on WAAF, to see if they could dispose of some of the debris. He contacted the Government employee in charge of the stable and through numerous phone calls claimed he was given the go ahead to dump the debris at the stables. The Government claims they told HGM to contact the contracting officer for approval and to modify the contract.

HGM began excavating the debris and dumping it at the horse stable without notifying the contracting officer. The Government became aware of this action when the contractor contacted and informed them that he was nearing contract completion. Upon arrival at the site, the Government noticed a large amount of debris still remained. The contractor said that he had hauled 4,175 cubic yards of debris and had met the contract requirements. He also stated that the Government must have underestimated the amount of material to be removed. The Government then became aware of the unauthorized dumping of the material at the horse stable. They took

measurements and estimated that HGM had only hauled approximately 1,875 cubic yards.

The contractor claimed that he fulfilled all contract requirements and thus deserved the remaining balance of funds on the contract. The Government claimed he had only accomplished \$10,312.50 worth of the \$22,000 contract and was willing to modify the contract to reflect it. The appellant refused this offer and reaffirmed its claim that it deserved the full contract price.

The Board ruled that the contract should be read in its plain and ordinary sense. This means the contract described disposal of the debris. The word disposed means to “transfer into new hands or to the control of someone else”, “to get rid of”, “throw away or discard.” (ASBCA No 53150) With this meaning and the fact that the contractor had arranged to dispose of the debris off base, HGM did not successfully comply with the terms and conditions of the contract. In fact, in the performance of a prior contract, HGM disposed of debris at an off base location. The Board also agreed with the Governments estimates of the amount of debris removed. Therefore, the claim was denied.

(1) Rule: When a claim of this type is brought before the Board, it must begin interpreting by looking at the contract as a whole. It cannot only read portions of the contract applicable to the disputed area. The first step in analyzing contract interpretation issues is to seek the original intent of the parties at the time of signing. By reading the language of the contract, the Board can familiarize themselves with the entire contract and the groundwork of the contract that lays out the specific requirements. Although this dispute was over a relatively small amount of money, the contracting officer was clearly in the right. Defending a case on principle, sometimes, is the appropriate thing to do.

(2) Lessons Learned: Out of the five cases analyzed above, there were six issues before the Board to be analyzed. Out of these, four were denied, one was sustained and the other was denied in part and sustained in part. Upon researching the sustained claim, the court found the Government’s interpretation of the contract requirements as unreasonable. As mentioned earlier, when ambiguity exists, the court

must determine if the two interpretations are within the “zone of reasonableness”. The Board found the Government’s interpretation as not reasonable due to the fact there were no stipulated quantities from each location. Looking back over the four denied claims, a lesson learned from this litigation is the contractor must be meticulous in reading and understanding the contract as a whole. As a prudent party to a contract, it may be beneficial to hire personnel experienced with Government contracting to decipher and completely understand the requirements of the contract. Alternately, it would be beneficial for the Government to take extra time to ensure the contractor is completely aware of all requirements of the contract.

The last case resulted in a split decision because the requirement to accomplish the dispute requirement was stipulated in the contract; however, the ability to use the demolished material as fill was not. Therefore the Board sent down a split decision. In this case, as addressed earlier, the contractor must review the contract with better scrutiny to ensure they understand all aspects. On the contrary, the Government needs to ensure they are addressing all details of the performance requirements so issues similar to this do not occur in the future.

As the data shows, for the most part, the Government does a respectable job creating contract requirements, monitoring the contracts and defending their position during litigation. However, as in most processes, it is the small things that can cause most of the problems. Therefore, the researchers suggest more open communication take place across acquisition professionals within the Government to facilitate familiarization with other’s issues and concerns. This helps ensure problems that occurred in the past at one location may not happen again at another.

b. Defining Contract Terms

Catel, Inc ASBCA 52224: submitted a claim for \$57,121 due to work previously deleted from the contract. Catel was awarded a \$302,000 contract to fill in or cut ditches due to erosion. During negotiations, a disagreement arose and the Government agreed to a reduction in price of the disputed area. Catel believed the disputed item should be deleted in its entirety. Six weeks after the notice to proceed was issued, Catel informed the Government they perceived the disputed area as deleted. The

Government reinforced its position that deleting this item was impossible because it was essential in the performance of this contract. The contractor was told to proceed with the work and Catel agreed, asserting its right to submit for an equitable adjustment at a future date.

The Board had to decide if both interpretations were reasonable. They began this by defining the words reduction and delete. Mr. Pires, President of Catel, testified that there was clearing and grubbing (disputed work) they would need to perform on the contract. He also stated that he intended to reduce, but not delete, a graded area excavation (another area of disputed work). They found that Catel's interpretation was not consistent with the ordinary meanings of the words; therefore, the appeal was denied.

HGM, Inc. ASBCA 53150: This case was described earlier in the disagreement over contract requirements section; however, it has an issue of defining contract terms as well. There was an issue concerning the proper disposal of debris. The court used the plain and ordinary meaning of the word to define it. The court found that the word dispose means, "transfer into new hands or to the control of someone else", "to get rid of", "throw away or discard." (ASBCA No 53150) With these definitions, it became obvious to the Board that HGM was not fulfilling the contract requirements because it was not properly disposing of the debris. The Board denied the claim.

(1) Rules for defining terms: When a Board is faced with interpreting the definition of a term within a contract, they must use a litmus test to try and resolve it. The first step is if a contract defines a term, one may not substitute an alternate definition. The Board must read the contract as a whole and verify original intent; therefore, changing the meaning of a term does not fit within this realm. The second step is to give ordinary terms their plain and ordinary meaning in defining the rights and obligations of the parties. In other words, define words according to their everyday meaning. Next, give technical terms their technical meanings. When doing this, specialized or trade meanings take precedence over "lay" terms. Therefore, when defining scientific and engineering terms give them their recognized technical meanings

unless the context or an applicable usage indicates a contrary intention. Also, Boards give terms unique to Government contracts their technical meanings.

(2) Lessons Learned: The two cases addressed above both resulted in denials by the Board. The reason for the denials of claims is obvious due to the simplistic definitions of both words applied by the Board. To prevent future litigation in this area, contractors need to ensure they are familiar with all terms used within the language of the contract. The Government could take steps to ensure any terms that could be misinterpreted are defined in writing and covered in pre-bid conferences and/or post award conferences, hedging against any future misunderstanding. The Government also needs to make sure any changes during negotiations or modifications to the contract are clear and precise with no chance of misunderstandings. Contracting officers must ensure the drafters of the requirements clearly state their needs.

c. Contract Ambiguity

Rio Construction Corporation ASBCA 54273: Rio submitted a claim due to the interpretation of the contract relating to the locations and quantities of fill material laid out within the contract. The contract called for an estimated 888,000 cubic meters of fill to be taken from three sites: the project excavation site, a borrow area, and a commercial quarry. The contractor used the data provided by the Government and computed its own figures concerning fill. The contractor estimated more fill in the project excavation area than the Government and thus used this information in its bid. Because it used its new estimates, it was able to price the applicable line items less than their competitors.

Approximately seven months after start of performance, the Government informed Rio Construction that they were not allowed to obtain any more fill material from the borrow site. They claimed that the contractor had used approximately 115% of the available fill. The Government also informed the contractor that according to the contract, they are required to use fill from a commercial quarry. Rio Construction informed the Government that they had done their own estimates and realized there was more fill available than what was initially estimated. The Government proposed modifying the contract to allow Rio to use the fill; however, the contractor would need to

pay at a rate equal to a commercial quarry. Rio agreed; however, they reserved their right to file a claim.

The Board found that the Government's interpretation of the contract was unreasonable and thus no ambiguity existed within the contract. The appeal was sustained.

Blueridge General, Inc ASBCA 53663: Blueridge submitted a claim for \$23,495.20 for topping out gypsum wallboard partitions. Blueridge was awarded a contract to renovate a building located at Langley AFB, VA. In the contract, there were two drawings that contradicted each other. The first required that partitions were to extend continuously to the concrete slabs. Another required partition to only extend 4 inches above the ceiling. The contractor submitted a request for information asking for clarification. The Government advised Blueridge that the type "A" partitions were to be full-height for sound purposes. The contractor subsequently topped out the walls. However, in its claim, the contractor stated that it is not customary in the drywall industry to extend partitions.

The Board ruled that in order for the contractor to win, Blueridge needed to prove the industry standard, and that they relied upon this interpretation when submitting its bid. They did neither; therefore, the appeal was denied and quantum was remanded to the contracting officer.

(1) Rules for resolving ambiguity: Ambiguity exists when two parties define specifications within the contract in different ways. When this occurs, the Board decides if the contract is susceptible to more than one reasonable interpretation. When this occurs, it is necessary to apply risk allocation principles to determine which party is ultimately responsible. First, in order for a contractor to prevail, the contractor must prove its interpretation is reasonable. It does not have to be the most reasonable interpretation, just simply reasonable enough that someone else could understand it the same way. Second, the opposing party to the claim must also have been the drafter of the contract. If the claim passes these two thresholds, then the contractor must prove they detrimentally relied on this interpretation in submitting its bid. If the contractor can

prove it relied on this interpretation when submitting its bid, then *contra proferentem* applies.

Contra proferentem puts the risk of ambiguity, lack of clarity and absence of proper warning on the drafting party, which could have prevented the controversy. It pushes the drafter to improve contractual forms and saves contractors from hidden traps not of their own making. However, *contra proferentem* shall not be applied if an ambiguity is patent and the contractor failed to seek clarification. A patent ambiguity exists if it would have been apparent to a reasonable person in the claimant's position or if the provisions conflict on the face of the agreement. If this is the case, prudent business persons should have noticed the ambiguity early on and asked for clarification.

(2) Lessons Learned: The two cases addressed under this area were split in the Board rulings. In the first case, the Government failed to meticulously spell out exactly what the contractor was allowed to use and how much. Had these areas been addressed, it would have diminished the ambiguity. The Board found that the Government's interpretation was not in the zone of reasonableness and thus resulted in the sustained claim.

In the second case, the Government had separate drawings giving different directions. The contractor recognized the disparity and thus received clarification from the Government; but still filed the claim due to what he believed was against industry standard or common practice. The contractor could not present enough evidence to sway the Board in support of their position; thus resulting in a denied claim.

In these cases, ambiguity and failure to read and understand the contract contributed to the litigation that followed. The Government needs to take a more proactive role in ensuring contractors are aware of and understand the requirements of the contract as well as ensure no ambiguity exists in their request for proposal. Communication between the parties involved in the contract is paramount and must be open to divert misunderstanding in the future.

d. Seeking Clarification

W. B. Meredith (WBM) II, Inc. ASBCA 53590: WBM entered into a contract with the Navy to renovate a facility at the Naval Air Station in Norfolk, VA. The solicitation involved six types of suites with 16 “S3” suites. When WBM and their sub contractor submitted their bid, they left off the price of wiring the suites because the wiring plan for the S3 suites was inadvertently omitted from the solicitation.

Therefore, WBM submitted a claim requesting an increase in cost due to the extra wiring required to complete the contract. The Government denied the claim because it was already included in the original bid, and if there was a problem with the schematics, WBM should have brought it up prior to submitting their bid.

The Board ruled that the omission of the electrical wiring plan for the S3 suites was obvious. And because WBM failed to seek clarification of the discrepancy, the appeal was denied.

Blueridge General, Inc ASBCA 53663: Again, this case was portrayed earlier under the contract ambiguity area; however, they properly sought clarification as prescribed. Their claim was ultimately denied because they failed to prove ambiguity existed in the contract requirements; however, they fulfilled their responsibility to try and clear the ambiguity. This claim was sustained on one area and denied the rest.

(1) Rules for seeking clarification: If a contractor’s interpretation falls into the “zone of reasonableness” and he relied upon it when submitting his bid, then the ambiguity would rest upon the drafter. However, if the ambiguity was patent, the contractor should have discovered it, and if there was no action to seek clarification, then *contra proferentem* does not apply.

(2) Lessons Learned: This area resulted in one denial and two split decisions. The results demonstrate how important it is for the contractor to seek clarification. In order for a contractor to achieve a sustainment at the Board during a contract interpretation issue, the contractor must have asked for clarification from the drafter. If no seeking of clarification exists, then the Board is less likely to apply the *contra proferentem* status against the Government. On the contrary, if a contractor asks for clarification, the Government should be put on alert due to conflicting direction

within the contract. They also need to ensure they properly direct the contractor and document it so that if litigation should arise in the future, they are properly prepared.

e. Custom or Trade Usage/Industry Standard

Arnold M. Diamond, Inc. ASBCA 53724 & 53725: The contractor, under contract interpretation issues as mentioned earlier, brought this case. AMD claimed the Government drawings inaccurately depicted the number of feet of steam pipe to be demolished. Within the contract, the Government had placed the terms “Do not scale drawings” and “the drawings are not to be scaled”. The Board held that the use of these statements puts the burden of pipeline length verification on the contractor. Industry standards in this area tell the bidders to not rely on the drawings. Henceforth, the claim was denied.

Blueridge General, Inc ASBCA 53663: In this case described earlier, the contractor claimed the Navy’s drawings and specifications were against industry standards. The Navy required the partitions to extend to the floor above while the contractor was stating the industry standard did not call for that. The Board entertained the claim; however, it put the burden upon the contractor to prove it. They needed to prove they relied on their interpretation during the bidding process; however, they never presented any bid documents to support their position, relying instead exclusively upon testimony. The Board ruled that the contractor did not prove its position; therefore, this part of the claim was denied.

(1) Rules for interpreting: When a board is faced with interpreting ambiguous provisions concerning custom or trade usage/industry standards, they must apply the following criteria. First, parties may not use custom and trade usage to contradict unambiguous terms. Second, parties may resort to custom and trade usage to explain or define unambiguous terms. Third, parties also may use an industry standard or trade usage to show that a term is ambiguous. Last, the party asserting the industry standard or trade usage bears the burden of proving the existence of the standard or usage. By using these “rules of thumb”, the Board is able to diffuse disputes.

(2) Lessons Learned: With only two cases in this category, it is hard to draw any conclusions. Although the Government won both cases pertaining to this issue, the Government needs to be proactive, familiarizing itself with language used in the commercial industry. Familiarization with the industry vernacular as well as ensuring the contractor fully understands the requirements will help prevent future conflicts.

f. Prior Course of Dealings

HGM, Inc. ASBCA 53150: This case has already been analyzed in two other areas; however, it also applies in this area as well. HGM was awarded a contract to remove debris from WAAF in Hawaii. Prior to the award of this contract, the contractor had been awarded a similar contract with Ft. Shafter. On this prior contract, HGM successfully removed debris from the base and disposed of it properly. Therefore, HGM's prior course of dealings with the Government demonstrated they understood that "dispose" means to get rid of. This along with other issues proved to be too much for HGM, resulting in the Board's denial of their claim.

(1) Rules for prior course of dealings: When a board is trying to determine the meaning of the current contract, they will consider a prior course of dealing between the parties in earlier contracts. Both parties must be aware of the prior course of dealings and any prior waivers of specifications must be numerous or consistent to vary an unambiguous term.

(2) Lessons Learned: With only one case in this area, we have a very narrow view to draw a conclusion. Although this case came out well for the Government, it could very easily have been reversed had prior dealings allowed the debris to be disposed of on a Government installation. Both contracting officers and contractors need to be aware of prior dealings and the performance parameters allowed by them. The contracting officer should conduct research on prior contracts with the contractor when preparing for this litigation.

E. OVERALL TRENDS

Terminations for default, defective specifications, and contract interpretation are the reasons for 37% of the claims evaluated by the researchers. Within this group of cases, there are some trends that have appeared.

A lack of communication seemed prevalent throughout many of the claims. While there was no clear, systemic reason apparent for why this is the case, communication clearly is a means by which contracting officers and contractors can avoid many potential claims. Establishing a relationship between the Government and the contractor is extremely important in ensuring success of the contract. This relationship must begin at the beginning of the contracting process if it is to become a positive, consistent pattern for contracting practices.

Misunderstanding contract clauses is another trend that was noted. Many of the claims disputed items that could have been resolved quickly had both parties clearly understood the FAR clauses in the contract. While different interpretations are always possible on any issue, a simple reading of the clauses in a contract, before the contract is awarded, during contract administration, and even during the litigation process may prevent many disputes from arising or continuing.

Construction contracts are unique compared to other types of contracts. Specifications can be complicated and there are many applicable regulations. This type of contract has a great potential for ambiguous descriptions and multiple, reasonable interpretations. The Government needs to emphasize accuracy of their requirements. Concomitantly, the contractors must ensure they have a clear understanding of the requirements. The pre-construction meeting is an important step that is used to alleviate any misunderstandings. It is important for the contractor and Government to come prepared to address any questions.

F. CONTRACTOR EVALUATION

After conducting a thorough analysis of the 99 cases submitted to ASBCA, the researchers made the following determinations on the contractor's strengths and weaknesses:

Contractor Strengths:

- Job knowledge and expertise
- Long term planning capabilities
- Funding issues not necessarily the same as the Government

Contractor Weaknesses:

- Lack of understanding unique Government requirements
- Poor communication
- Lack of understanding contract requirements
- Unable to demonstrate burden of proof
- Unaware of previous court decisions

G. GOVERNMENT EVALUATION

After conducting a thorough analysis of the 99 cases submitted to ASBCA, the researchers made the following determinations on the Government's strengths and weaknesses:

Government Strengths:

- Clear understanding of Government unique requirements
- Clear understanding of demonstrating burden of proof

Government Weaknesses:

- Poor communication
- Ambiguous contract requirements
- Lack of timely involvement in decision making
- Lack of continuity - Contracting officer unavailable for questioning
- Allowing contractor to delay submittals
- Not consistently timely with providing feedback and decisions to contractors

H. CHAPTER SUMMARY

This chapter presented an analysis of the top three reasons for disputes. The chapter included a description of the reason for the dispute, a comparison of data for each reason, and case examples for each reason. The chapter continued with a description of overall trends and concluded with an evaluation of the contractor's and Government's strengths and weaknesses.

In the next chapter, the researchers provide a summary of their findings and provide recommendations for further research.

V. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

After reviewing and analyzing the Armed Services Board of Contract Appeals cases and independent research data on literature pertinent to this subject, the researchers have reached the general conclusion there are commonalities among the construction claims brought before the Board. Additionally, it appears that both the Government and the contractor can take precautions to ensure less disagreement between the parties and hopefully facilitate a smoother contract performance.

B. RECOMMENDATIONS

1. Terminations for Defaults

Many of the sustained claims were due to the contracting officer's failure to read and/or fully understand the clauses in his/her own contract. Most clauses are incorporated by reference, and contracting officers are cautioned to read them rather than rely on institutional knowledge or experience. This is especially true for new contracting officers. Taking extra time and ensuring all contract clauses are understood will help prevent future litigation.

Many of the denied claims were a direct result of a contractor's failure to read all clauses in the contract. The majority of clauses in Government contracts are usually incorporated by reference. However, it is the contractor's responsibility to find and read the clauses in full text. It is imperative that the contracting officer emphasize that it is the contractor's responsibility to read and understand all contract clauses. Claims could be avoided if the contractor had a clearer understanding of the contract clauses.

It is sometimes impossible to prevent a claim, but through a better relationship between the Government and the contractor, disputes can be handled at a lower level – i.e., ADR. As the contracting officer, it is important to develop and maintain a positive relationship with contractors. Communication between all parties is imperative. Through effective communication and partnering with the contractor, claims can be decreased significantly.

2. Defective Specifications

As mentioned earlier, it is imperative for the Government and contractor to have a clear understanding of the Specifications and Drawings clause. It is just as important for the contractor to understand the specifications of the contract. Claims could have been prevented if the contractor had a clear understanding of the contract clauses.

Deciding when to submit a claim and when ADR is possible is imperative for a highly effective organization. Several claims that were reviewed were for a small percentage of the total cost of the contract. The cost of litigation probably exceeded the value of the claim. The contracting officer is charged with trying to resolve the dispute at the lowest possible level.

Although complete elimination of claims is impossible, it is how the Government handles the situation that is important. When disputes arise, it is important for the Government to be prepared. Not only does the contracting officer have responsibilities, every Government employee involved with the contract could potentially impact the outcome of the dispute. It is important for the Government to have one voice.

It is important to understand that although a contracting officer may come up with a good solution; the contractor may not always accept it with open arms. It is the contracting officer's responsibility to work as a business manager and think outside the box. It is also important that the contractor understands the unique circumstances when working with the Government. The contracting officer must ensure he communicates who is authorized to make changes to the contract.

3. Contract Interpretation

Many of the sustained claims were due to negligence or lack of attention to detail on the part of the Government. By taking extra time and ensuring all requirements within the contract are inherently clear with no ambiguity, future litigation in this area should decrease considerably.

A precautionary measure the Government can do use is to take extra time to ensure the contractor is completely aware of all requirements, addressing them in detail at the pre-bid conference as well as the post award conference. Another measure is to ensure all modifications or request for clarifications are clear and precise, while clearly

stating the needs of the Government. Lastly, it is paramount that the Government and Contractor have clear and open communications throughout the entire process. Without it, confusion and disjunctions arise. In addition to communicating with the contractor, the Government may want to open up dialogue with other Government acquisition professionals to share knowledge and familiarize themselves with issues and concerns. Familiarization with common industry language and standards also bolsters communication between the parties involved.

Many of the denied claims were a direct result of the contractor not being familiar with doing business with the Government or failing to read the requirements of the contract. By familiarizing themselves with the Federal Acquisition Regulation and meticulously digesting the parameters of the contract, contractors will be better prepared for conducting government business and have a better understanding of the task at hand.

A few measures the contractors can accomplish to prepare themselves are to hire personnel experienced with Government contracting to decipher and completely understand the requirements of the contract. They must also scrutinize the contract and ensure they understand all aspects including the terms used within the language of the contract. Lastly, they must ensure they document all correspondence and communication between the Government and themselves for future reference.

Both parties need to ensure communication is clear between them and must be aware of any prior business dealings. Prior dealings and the way they were carried out sets precedence for future actions.

4. Overall Recommendations

In order for the Government to effectively minimize claims, a climate of partnership must exist between the contractor and the Government. Communication must be clear and open. The contractor should feel comfortable approaching the Government, and the Government must make every effort to clearly communicate their decisions. Fairness and reasonableness should be considered in every decision that is made. When questions and concerns arise, decisions should be made collaboratively whenever possible.

Providing performance specifications as much as possible helps alleviate the Government from some responsibility on ambiguous contract specifications. Utilizing performance specifications also provides a forum for the contractor to be innovative in completing the requirements of the contract. Utilizing design build contracts also places the responsibility on one contractor instead of having separate contracts for the Architecture and Engineering and one for construction.

Training is the key throughout. Every Government and contractor employee must be properly trained in working with unique construction contracts. When a new contractor begins work on a Government installation, it is imperative that the Government provided proper training for their employees. A little more effort at the onset of a new contract can significantly decrease problems in the future.

C. ANSWERS TO RESEARCH QUESTIONS

1. Primary Research Question

a. What Issues Arise between the Federal Government and Construction Contractors, which Warrant the Filing of a Claim with the ASBCA?

The most prevalent issue that arises between the parties is unclear direction and ambiguous terms. These resulted in the majority of the claims overall and usually could have been resolved prior to litigation. The second most popular issue is the lack of understanding of the contract clauses. It was mostly on the contractor's side; however, there were instances where the contracting officer was unfamiliar with the clauses as well. Another common area was the contractor submitting requests for equitable adjustments. Contractors were seeking compensation for completing additional work and requesting additional time. This stems from an unclear understanding of the requirements and/or conditions beyond their control that delayed their performance.

2. Secondary Questions

a. What are the Common Areas of Disagreement, which Result in Claims Filed by Construction Contractors?

Failure to agree on the interpretation of the contract specifications was prevalent in many of the analyzed cases. Ownership of the problem was another problem that was obvious in many cases. The problem, whether anticipated or not, occurred, and neither party claimed responsibility. Instead of wasting time pointing fingers, the time

and energy could be effectively utilized to come to a decision that both parties can live with. Negotiating the value of the unforeseen changes was a large area for disagreement between the parties. When determining fair and reasonable, it is difficult at times to a justifiable method on pricing changes.

Delays resulting from weather and unforeseen circumstances were another area for disagreement. Construction contracting has unique problems that other contracts do not have. Weather plays a significant role in the successful completion of most construction contracts. Determining fair and reasonable, once again, becomes difficult.

b. Were There Any Common Mistakes Made by Either Party of the Contract that Resulted in the Filing of a Claim?

The most frequently occurring mistake was made by the contractor failing to completely understand the requirements of the contract. The Government made mistakes concerning the solicitation, statement of work, drawings and specifications; however, most of these mistakes were not latent and should have been caught by contractors.

Unfamiliarity with the terms and conditions of the contract is prevalent in a significant number of cases. Since many of the contract clauses are incorporated by reference, the contractor and the Government do not always seem to take the time to understand all of them. Another common mistake is ambiguous requirements by the Government. Although the Government did not lose many cases regarding contract interpretation, the overall claim could have been prevented if the requirements were written more clearly.

Lastly, misunderstanding the law behind each contract action led to claims submitted to the Board. Case law existed for a significant number of claims that were submitted. If either party had knowledge of the previous case law, they could have resolved it at a lower level. Another point regarding the law is understanding the actual law. For example, the contractor would cite ambiguous specifications as a basis for a claim. However, the Board would find that the contract read as a “whole” was clear. The parties would look at only the specification versus looking at the entire contract.

c. Are There Steps that Government Contracting Officers Can Take to Preclude the Same Mistakes from Happening in the Future?

To summarize the research findings, contracting officers need to foster clear and open communication between themselves and the contractor. Many of the cases could have been resolved had the two parties communicated effectively. Another area is to ensure the Government's requirements are not excessive. The contracting officer must ensure the requirements are clear and concise and follow standard industry practices. Any deviations from this can lead to litigation and result in a loss of time and money – for both parties. Lastly, contracting officers need to be intimately familiar with the Federal Acquisition Regulation. By doing this they will not make procedural errors and will be well informed. Having properly trained acquisition specialist is vital to preventing future claims.

D. SUGGESTED AREAS FOR FURTHER RESEARCH

- Evaluate each branch of service and their common practices. What are some unique things each service does in construction contracting? Can we implement those ideas DOD wide? What are some things they are doing wrong? Can we learn from them?
- Create a Contractor's guide for understanding construction contracts in the Government. Provide clear, easy to understand interpretation of each construction clause. Describe their rights and responsibilities. The Contractor's guide should be given to each new contractor upon contract award. This could prevent many claims.
- Evaluate the number of claims by a branch of service. Why do they have more than others? What is the percentage of contracts awarded versus claims submitted to the Board. Are there any trends?
- With today's technology, should recording devices be utilized during pre-construction and pre-bid meetings? How can technology help prevent future claims?
- With the drive to implement performance-based contracting throughout the Government, how feasible is it to utilize in a construction contract. Research options and possibilities to utilize performance-based contracting in construction contracts.

E. CONCLUSION

In summary, most contractual relationships between the Government and contractors are cordial and generate the product or service required. However, lack of attention to detail and communication along with misunderstandings can quickly place a rift between the parties. That rift tends to result in litigation and a loss of time and money for all parties involved. Assertive action from both sides can preclude occurrences and contribute to successful contract completion.

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APPENDIX A. CONTRACT DISPUTES ACT OF 1978

33.202 -- Contract Disputes Act of 1978.

The Contract Disputes Act of 1978, as amended (41 U.S.C.601-613) (the Act), establishes procedures and requirements for asserting and resolving claims subject to the Act. In addition, the Act provides for:

- (a) The payment of interest on contractor claims;
- (b) Certification of contractor claims; and
- (c) A civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact

52.233-1 -- Disputes (July 2002).

- (a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).
- (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.
- (c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.
- (d)
 - (1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.
 - (2)
 - (i) The contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding \$100,000.

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(h) The Government shall pay interest on the amount found due and unpaid from

(1) the date that the Contracting Officer receives the claim (certified, if required);
or

(2) the date that payment otherwise would be due, if that date is later, until the date of payment.

With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer

APPENDIX B. ASBCA CHARTER

Approved 1 May 1962

Revised 1 May 1969

Revised 1 September 1973

Revised 1 July 1979

Charter

1. There is created the Armed Services Board of Contract Appeals which is hereby designated as the authorized representative of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy and the Secretary of the Air Force, in hearing, considering and determining appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities on disputed questions. These appeals may be taken (a) pursuant to the Contract Disputes Act of 1978 (41 U.S.C. Sect. 601, et seq.), (b) pursuant to the provisions of contracts requiring the decision by the Secretary of Defense or by a Secretary of a Military Department or their duly authorized representative or board, or (c) pursuant to the provisions of any directive whereby the Secretary of Defense or the Secretary of a Military Department has granted a right of appeal not contained in the contract on any matter consistent with the contract appeals procedure. The Board may determine contract disputes for other departments and agencies by agreement. The Board shall operate under general policies established or approved by the Under Secretary of Defense (Research and Engineering).

2. Membership of the Board shall consist of attorneys at law who have been qualified in the manner prescribed by the Contract Disputes Act of 1978. Members of the Board are hereby designated Administrative Judges. There shall be appointed from the members of the Board a chairman and two or more vice-chairmen. Appointment of the chairman and vice-chairmen and other members of the Board shall be made by the Under Secretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement. The chairman and vice-chairmen shall serve in that capacity for a two-year term unless sooner removed or reappointed for an additional term or terms. The Under Secretary will also designate the order in which the vice-chairmen will act for the chairman in his absence. In the absence of a vice-chairman, the chairman or acting chairman may designate a member of the Board to serve as a temporary.

3. It shall be the duty and obligation of the members of the Armed Services Board of Contract Appeals to decide appeals on the record of the appeal to the best of their knowledge and ability in accordance with applicable contract provisions and in accordance with law and regulation pertinent thereto.

4. The chairman of the Board shall be responsible for establishing appropriate divisions of the Board to provide for the most effective and expeditious handling of appeals. He

shall be responsible for assigning appeals to the divisions for decision without regard to the military department or other procuring agency which entered into the contract. A division may consist of one or more members of the Board. The chairman shall designate one member of each division as the division head. The division heads and the chairman and vice-chairmen shall constitute the senior deciding group of the Board. A majority of the members of a division or of the senior deciding group shall constitute a quorum for the transaction of the business of each, respectively. Decisions of the Board shall be by majority vote of the members of a division participating and the chairman and a vice-chairman, unless the chairman refers the appeal for decision by the senior deciding group. The decision of the Board in cases so referred to the senior deciding group shall be by majority vote of the participating members of that group. The chairman may refer an appeal of unusual difficulty, significant precedential importance, or serious dispute within the normal decision process for decision by the senior deciding group. An appeal involving \$50,000 or less may be decided by a single member or fewer members of the Board than hereinbefore provided for cases of unlimited dollar amount, under accelerated or expedited procedures as provided in the Rules of the Board and the Contract Disputes Act of 1978.

5. The Board shall have all powers necessary and incident to the proper performance of its duties. Subject to the approval of the Under Secretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement, the Board shall adopt its own methods of procedure, and rules and regulations for its conduct and for the preparation and presentation of appeals and issuance of opinions. The Military Departments and other procuring agencies shall provide legal personnel to prepare and present the contentions of the departments or agencies in relation to appeals filed with the Board. It shall not be necessary for the Board, unless it otherwise desires, to communicate with more than one trial attorney in each of the department or agencies concerning the preparation and presentation of appeals and the obtaining of all records deemed by the Board to be pertinent thereto.

6. Any member of the Board or any examiner, designated by the chairman, shall be authorized to hold hearings, examine witnesses and receive evidence and argument for consideration and determination of the approval by the designated division. A member of the Board shall have authority to administer oaths and issue subpoenas as specified in Section 11 of the Contract Disputes Act of 1978. The chairman may request orders of the court in cases of contumacy or refusal to obey a subpoena in the manner prescribed in that Section.

7. The Chairman shall be responsible for the internal organization of the Board and for its administration. He shall provide within approved ceilings for the staffing of the Board with non-member personnel, including hearing examiners, as may be required for the performance of the functions of the Board. The chairman shall appoint a recorder of the Board. Such personnel shall be responsible to and shall function under the direction, supervision and control of the chairman.

8. The Board will be serviced by the Department of the Army for administrative support for its operations as required. Administrative support will include budgeting, funding, fiscal control, manpower control and utilization, personnel administration, security administration, supplies, and other administrative services. The Departments of the Army, Navy, Air Force and the Office of the Secretary of Defense will participate in financing the Board's operations on an equal basis and to the extent determined by the Assistant Secretary of Defense (Comptroller). The cost of processing appeals for departments and agencies other than those in the Department of Defense will be reimbursed.

9. The chairman of the Board will furnish the Secretary of Defense and to the Secretaries of the Military Departments by October 31 each year a report containing and account of the Board's transactions and proceedings for the preceding fiscal year. Within 30 days following the close of a calendar quarter, the chairman shall forward a report of the Board's proceedings for the quarter to the Under Secretary of Defense (Research and Engineering), the Assistant Secretaries of the Military Departments responsible for procurement, and to the Director of the Defense Logistics Agency. Such reports shall disclose the number of appeals received, cases heard, opinions rendered, current reserve of pending matters, and such other information as may be required.

10. The Board shall have a seal bearing the following inscription: "Armed Services Board of Contract Appeals." This seal shall be affixed to all authentications of copies of records and to such other instruments as the Board may determine.

11. This revised charter is effective April 21, 1980.

APPROVED:

W. GRAHAM CLAYTON, JR.
Deputy Secretary of Defense

CLIFFORD L. ALEXANDER, JR.
Secretary of the Army

E. HIDALGO
Secretary of the Navy

HANS M. MARK
Secretary of the Air Force

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APPENDIX C. ASBCA RULES

RULES

of the

ARMED SERVICES BOARD OF CONTRACT APPEALS

1 July 1997

[Reprint]

THESE RULES ARE APPLICABLE
TO APPEALS PROCESSED UNDER THE
CONTRACT DISPUTES ACT OF 1978 (CDA),
41 U.S.C. §§ 601-613, AS AMENDED, AND
OTHER APPEALS TO THE EXTENT
CONSISTENT WITH LAW.

NOTE TO APPELLANTS

The optional accelerated procedure is available if the disputed amount is \$100,000 or less. Alternatively, if the amount in dispute is \$50,000 or less, you may elect to have the appeal processed under an expedited small claims procedure. Both the accelerated procedure and the small claims expedited procedure are described in Rule 12. Please note the 180-day limit on processing accelerated procedure cases and the 120-day limit on processing small claims expedited procedure cases.

In addition, the CDA provides for the issuance of subpoenas. If you desire the issuance of a subpoena please refer to Rule 21. A standardized format for pleadings is attached.

AUTHOR'S NAME & ORGANIZATION
ADDRESS
(AREA CODE) PHONE NUMBER

[] Month []

Recorder
Armed Services Board of Contract Appeals
Skyline Six, Room 703
5109 Leesburg Pike
Falls Church, Virginia 22041-3208

Re: ASBCA No. []
Appeal of [Appellant's Name]
Under Contract No. []

TITLE OF PLEADING [TEXT OF PLEADING]

/s/
Author's
Name
Title

CC: W/ENCL TO:
opposing party
address

Your adoption of the above standard format will assist the Board in its efforts to deal efficiently with incoming correspondence and pleadings.

Particular attention should be directed towards:

1. the caption, which includes (a) the ASBCA number, (b) the appellant's name, (c) the contract number, and (d) a descriptive title of the filing (e.g., complaint);
2. furnishing copies of correspondence to the opposing party and indicating compliance with this requirement ("cc: w/encl," will generally suffice); and
3. providing the author's phone number on all correspondence to assist in clarifying potential confusion and complying with Board Rule 26 concerning representation of appellant.

The Board appreciates your cooperation.

RULES OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS

PREFACE

I. Jurisdiction for Considering Appeals

The Armed Services Board of Contract Appeals (referred to herein as the "Board") shall consider and determine appeals from decisions of contracting officers pursuant to the

Contract Disputes Act of 1978 (Public Law 95-563, 41 U.S.C. §§ 601-613) relating to contracts made by (i) the Departments of Defense, Army, Navy and Air Force or (ii) any other executive agency when such agency or the Administrator for Federal Procurement Policy has designated the Board to decide the appeal.

II. Location and Organization of the Board

(a) The Board's address is Skyline Six, Room 703, 5109 Leesburg Pike, Falls Church, Virginia 22041-3208, telephone (703) 681-8502.

(b) The Board consists of a chairman, vice chairmen, and other members, all of whom are attorneys at law duly licensed by a state, commonwealth, territory, or the District of Columbia. Board members are designated Administrative Judges.

(c) There are a number of divisions of the Armed Services Board of Contract Appeals, established by the chairman of the Board in such a manner as to provide for the most effective and expeditious handling of appeals. The chairman and a vice chairman of the Board act as members of each division. Appeals are assigned to the divisions for decision without regard to the military department or other procuring agency which entered into the contract involved. Hearing may be held by a designated member (Administrative Judge), or by a duly authorized examiner. Except for appeals processed under the expedited or accelerated procedure the decision of a majority of a division constitutes the decision of the Board, unless the chairman refers the appeal to the Board's Senior Deciding Group (consisting of the chairman, vice chairmen and all division heads), in which event a decision of a majority of that group constitutes the decision of the Board. Appeals referred to the Senior Deciding Group are those of unusual difficulty, significant precedential importance, or serious dispute within the normal division decision process. For decisions of appeals processed under the expedited or accelerated procedure see Rules 12.2(c) and 12.3(b).

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RULES Preliminary Procedures

Rule 1. Appeals, How Taken

(a) Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken.

(b) Where the contractor has submitted a claim of \$100,000 or less to the contracting officer and has requested a written decision within 60 days from receipt of the request, and the contracting officer has not done so, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(c) Where the contractor has submitted a properly certified claim over \$100,000 to the contracting officer or has requested a decision by the contracting officer which presently involves no monetary amount pursuant to the Disputes clause, and the contracting officer has failed to issue a decision within a reasonable time, taking into account such factors as the size and complexity of the claim, the

contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(d) Upon docketing of appeals filed pursuant to (b) or (c) hereof, the Board may, at its option, stay further proceedings pending issuance of a final decision by the contracting officer within such period of time as is determined by the Board.

(e) In lieu of filing a notice of appeal under (b) or (c) hereof, the contractor may request the Board to direct the contracting officer to issue a decision in a specified period of time, as determined by the Board, in the event of undue delay on the part of the contracting officer.

Rule 2. Notice of Appeal, Contents of

A notice of appeal should indicate that an appeal is being taken and should identify the contract (by number), the department and/or agency involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. The notice of appeal should be signed personally by the appellant (the contractor taking the appeal), by the appellant's duly authorized representative or attorney. The complaint referred to in Rule 6 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

Rule 3. Docketing of Appeals

When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. Notice in writing shall be given to the appellant with a copy of these rules, and to the contracting officer.

Rule 4. Preparation, Content, Organization, Forwarding, and Status of Appeal File

(a) Duties of Contracting Officer - Within 30 days of receipt of an appeal, or notice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board an appeal file consisting of all documents pertinent to the appeal, including:

- (1) the decision from which the appeal is taken;
- (2) the contract, including pertinent specifications, amendments, plans, and drawings;
- (3) all correspondence between the parties relevant to the appeal, including the letter or letters of claim in response to which the decision was issued;

(4) transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) any additional information considered relevant to the appeal.

Within the same time above specified the contracting officer shall furnish the appellant a copy of each document he transmits to the Board, except those in subparagraph (a)(2) above. As to the latter, a list furnished appellant indicating specific contractual documents transmitted will suffice.

(b) Duties of the Appellant - Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant shall transmit to the Board any documents not contained therein which he considers relevant to the appeal, and furnish two copies of such documents to the government trial attorney.

(c) Organization of Appeal File - Documents in the appeal file may be originals or legible facsimiles or authenticated copies, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.

(d) Lengthy Documents - Upon request by either party, the Board may waive the requirement to furnish to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when inclusion would be burdensome. At the time a party files with the Board a document as to which such a waiver has been granted he shall notify the other party that the document or a copy is available for inspection at the offices of the Board or of the party filing same.

(e) Status of Documents in Appeal File - Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to consideration of a particular document or documents reasonably in advance of hearing or, if there is no hearing, of settling the record. If such objection is made the Board shall remove the document or documents from the appeal file and permit the party offering the document to move its admission as evidence in accordance with Rules 13 and 20.

(f) Notwithstanding the foregoing, the filing of the Rule 4 (a) and (b) documents may be dispensed with by the Board either upon request of the appellant in his notice of appeal or thereafter upon stipulation of the parties.

Rule 5. Motions

(a) Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded on application of either party. However, the Board may defer its decision on the motion pending hearing on both the merits

and the motion. The Board shall have the right at any time and on its own initiative to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

(b) The Board may entertain and rule upon other appropriate motions.

Rule 6. Pleadings

(a) Appellant - Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. Upon receipt of the complaint, the Board shall serve a copy of it upon the Government. Should the complaint not be received within 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth its complaint and the Government shall be so notified.

(b) Government - Within 30 days from receipt of the complaint, or the aforesaid notice from the Board, the Government shall prepare and file with the Board an original and two copies of an answer thereto. The answer shall set forth simple, concise and direct statements of Government's defenses to each claim asserted by appellant, including any affirmative defenses available. Upon receipt of the answer, the Board shall serve a copy upon appellant. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the Government, and the appellant shall be so notified.

(c) A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The Board, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rules 11, 13 or 20. The determination of foreign law shall be treated as a ruling on a question of law.

Rule 7. Amendments of Pleadings or Record

The Board upon its own initiative or upon application by a party may order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleading upon conditions fair to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings, are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects

as if they had been raised therein. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. If evidence is objected to at a hearing on the grounds that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

Rule 8. Hearing Election

After filing of the Government's answer or notice from the Board that it has entered a general denial on behalf of the Government, each party shall advise whether it desires a hearing as prescribed in Rules 17 through 25, or whether it elects to submit its case on the record without a hearing, as prescribed in Rule 11.

Rule 9. Prehearing Briefs

Based on an examination of the pleadings, and its determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to Rule 8. If the Board does not require prehearing briefs either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party as previously arranged.

Rule 10. Prehearing or Presubmission Conference

(a) Whether the case is to be submitted pursuant to Rule 11, or heard pursuant to Rule 17 through 25, the Board may upon its own initiative, or upon the application of either party, arrange a telephone conference or call upon the parties to appear before an administrative judge or examiner of the Board for a conference to consider:

- (1) simplification, clarification, or severing of the issues;
- (2) the possibility of obtaining stipulations, admissions, agreements and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;
- (3) agreements and rulings to facilitate discovery;
- (4) limitation of the number of expert witnesses, or avoidance of similar cumulative evidence;
- (5) the possibility of agreement disposing of any or all of the issues in dispute; and

(6) such other matters as may aid in the disposition of the appeal.

(b) The administrative judge or examiner of the Board shall make such rulings and orders as may be appropriate to aid in the disposition of the appeal. The results of pre-trial conferences, including any rulings and orders, shall be reduced to writing by the administrative judge or examiner and this writing shall thereafter constitute a part of the record.

Rule 11. Submission Without a Hearing

Either party may elect to waive a hearing and to submit its case upon the record before the Board, as settled pursuant to Rule 13. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submissions to be supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance with Rule 23.

Rule 12. Optional SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedures

These procedures are available solely at the election of the appellant.

12.1 Elections to Utilize SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedures

(a) In appeals where the amount in dispute is \$50,000 or less, the appellant may elect to have the appeal processed under a SMALL CLAIMS (EXPEDITED) procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election to utilize this procedure. The details of this procedure appear in section 12.2 of this Rule. An appellant may elect the ACCELERATED procedure rather than the SMALL CLAIMS (EXPEDITED) procedure for any appeal eligible for the SMALL CLAIMS (EXPEDITED) procedure.

(b) In appeals where the amount in dispute is \$100,000 or less, the appellant may elect to have the appeal processed under an ACCELERATED procedure requiring decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election to utilize this procedure. The details of this procedure appear in section 12.3 of this Rule.

(c) The appellant's election of either the SMALL CLAIMS (EXPEDITED) procedure or the ACCELERATED procedure may be made by written notice within 60 days after receipt of notice of docketing, unless such period is extended by the Board for good cause. The election may not be withdrawn except with permission of the Board and for good cause.

12.2 The SMALL CLAIMS (EXPEDITED) Procedure

(a) In cases proceeding under the SMALL CLAIMS (EXPEDITED) procedure, the following time periods shall apply:

(1) Within 10 days from the Government's first receipt from either the appellant or the Board of a copy of the appellant's notice of election of the SMALL CLAIMS (EXPEDITED) procedure, the Government shall send the Board a copy of the contract, the contracting officer's final decision, and the appellant's claim letter or letters, if any; remaining documents required under Rule 4 shall be submitted in accordance with times specified in that rule unless the Board otherwise directs;

(2) Within 15 days after the Board has acknowledged receipt of appellant's notice of election, the assigned administrative judge shall take the following actions, if feasible, in an informal meeting or a telephone conference with both parties: (i) identify and simplify the issues; (ii) establish a simplified procedure appropriate to the particular appeal involved; (iii) determine whether either party wants a hearing, and if so, fix a time and place therefore; (iv) require the Government to furnish all the additional documents relevant to the appeal, and (v) establish an expedited schedule for resolution of the appeal.

(b) Pleadings, discovery, and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the date scheduled, or if no hearing is scheduled, to close the record on a date that will allow decisions within the 120-day limit. The Board, in its discretion, may impose shortened time periods for any actions prescribed or allowed under these rules, as necessary to enable the Board to decide the appeal within the 120-day limit, allowing whatever time, up to 30 days, that the Board considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(c) Written decision by the Board in cases processed under the SMALL CLAIMS (EXPEDITED) procedure will be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single administrative judge. If there has been a hearing, the administrative judge presiding at the hearing may, in the judge's discretion, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes and to establish the starting date for the period for filing a motion for reconsideration under Rule 29.

(d) A decision against the Government or the contractor shall have no value as precedent, and in the absence of fraud shall be final and conclusive and may not be appealed or set aside.

12.3 The ACCELERATED Procedure

(a) In cases processing under the ACCELERATED procedure, the parties are encouraged, to the extent possible consistent with adequate presentation of their factual and legal positions, to waive pleadings, discovery, and briefs. The Board, in its discretion, may shorten time periods prescribed or allowed elsewhere in these Rules, including Rule 4, as necessary to enable the Board to decide the appeal within 180 days after the Board has received the appellant's notice of election of the ACCELERATED procedure, and may reserve 30 days for preparation of the decision.

(b) Written decision by the Board in cases processed under the ACCELERATED procedure will normally be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single administrative judge with the concurrence of a vice chairman, or by a majority among these two and the chairman in case of disagreement. Alternatively, in cases where the amount in dispute is \$50,000 or less as to which the ACCELERATED procedure has been elected and in which there has been a hearing, the single administrative judge presiding at the hearing may, with the concurrence of both parties, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes, and to establish the starting date for the period for filing a motion for reconsideration under Rule 29.

12.4 Motions for Reconsideration in Rule 12 Cases

Motions for Reconsideration of cases decided under either the SMALL CLAIMS (EXPEDITED) procedures or the ACCELERATED procedure need not be decided within the original 120-day or 180-day limit, but all such motions shall be processed and decided rapidly so as to fulfill the intent of this Rule.

Rule 13. Settling the Record

(a) The record upon which the Board's decision will be rendered consists of documents furnished under Rules 4 and 12, to the extent admitted in evidence, and the following items, if any: pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, post-hearing briefs, and documents which the Board has specifically designated

be made part of the record. The record will, at all reasonable times, be available for inspection by the parties at the office of the Board.

(b) Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

Rule 14. Discovery - Depositions

(a) General Policy and Protective Orders - The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

(b) When Depositions Permitted - After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(c) Orders on Depositions - The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, governed by order of the Board.

(d) Use as Evidence - No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received in evidence as such hearing. It will not ordinarily be received in evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

(e) Expenses - Each party shall bear its own expenses associated with the taking of any deposition.

(f) Subpoenas - Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 21.

Rule 15. Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents

After an appeal has been docketed and complaint filed with the Board, a party may serve on the other party: (a) written interrogatories to be answered separately in writing, signed under oath and answered or objected to within 45 days after service; (b) a request for the admission of specified facts and/or the authenticity of any documents, to be answered or objected to within 45 days after service; the factual statements and the authenticity of the documents to be deemed admitted upon failure of a party to respond to the request; and (c) a request for the production, inspection and copying of any documents or objects not privileged, which reasonably may lead to the discovery of admissible evidence, to be answered or objected to within 45 days after service. The Board may allow a shorter or longer time. Any discovery engaged in under this Rule shall be subject to the provisions of Rule 14(a) with respect to general policy and protective orders, and of Rule 35 with respect to sanctions.

Rule 16. Service of Papers Other than Subpoenas

Papers shall be served personally or by mail, addressed to the party upon whom service is to be made. Copies of complaints, answers and briefs shall be filed directly with the Board. The party filing any other paper with the Board shall send a copy thereof to the opposing party, noting on the paper filed with the Board that a copy has been so furnished. Subpoenas shall be served as provided in Rule 21.

Hearings

Rule 17. Where and When Held

Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, Rule 12 requirements, and other pertinent factors. On request or motion by either party and for good cause, the Board may, in its discretion, adjust the date of a hearing.

Rule 18. Notice of Hearings

The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearings shall be promptly acknowledged by the parties.

Rule 19. Unexcused Absence of a Party

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

Rule 20. Hearings: Nature, Examination of Witnesses

(a) Nature of Hearings - Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and the Government may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding administrative judge or examiner. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.

(b) Examination of Witnesses - Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding administrative judge or examiner shall otherwise order. If the testimony of a witness is not given under oath, the Board may advise the witness that his statements may be subject to the provisions of Title 18, United States Code, sections 287 and 1001, and any other provision of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof.

Rule 21. Subpoenas

(a) General - Upon written request of either party filed with the Recorder, or on his own initiative, the administrative judge to whom a case is assigned or who is otherwise designated by the chairman may issue a subpoena requiring:

(i) testimony at a deposition - the deposing of a witness in the city or county where he resides or is employed or transacts his business in person, or at another location convenient for him that is specifically determined by the Board;

(ii) testimony at a hearing - the attendance of a witness for the purpose of taking testimony at a hearing; and

(iii) production of books and papers - in addition to (i) or (ii), the production by the witness at the deposition or hearing of books and papers designated in the subpoena.

(b) Voluntary Cooperation - Each party is expected (i) to cooperate and make available witnesses and evidence under its control as requested by the other party, without issuance of a subpoena, and (ii) to secure voluntary attendance of desired

third-party witnesses and production of desired third-party books, papers, documents, or tangible things whenever possible.

(c) Request for Subpoenas -

(1) A request for subpoena shall normally be filed at least:

(i) 15 days before a scheduled deposition where the attendance of a witness at a deposition is sought;

(ii) 30 days before a scheduled hearing where the attendance of a witness at a hearing is sought.

In its discretion the Board may honor requests for subpoenas not made within these time limitations.

(2) A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any books and papers sought.

(d) Requests to Quash or Modify - Upon written request by the person subpoenaed or by a party, made within 10 days after service but in any event not later than time specified in the subpoena for compliance, the Board may (i) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or (ii) require the person in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed books and papers. Where circumstances require, the Board may act upon such a request at any time after a copy has been served upon the opposing party.

(e) Form; Issuance -

(1) Every subpoena shall state the name of the Board and the title of the appeal, and shall command each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified books and papers at a time and place therein specified. In issuing a subpoena to a requesting party, the administrative judge shall sign the subpoena and may, in his discretion, enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781-1784.

(f) Service -

(1) The party requesting issuance of a subpoena shall arrange for service.

(2) A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law; however, where the subpoena is issued on behalf of the Government, money payments need not be tendered in advance of attendance.

(3) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and the books or papers the witness has produced.

(g) Contumacy or Refusal to Obey a Subpoena - In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States District Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

Rule 22. Copies of Papers

When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefore, during the hearing or at the conclusion thereof.

Rule 23. Post-Hearing Briefs

Post-hearing briefs may be submitted upon such terms as may be directed by the presiding administrative judge or examiner at the conclusion of the hearing.

Rule 24. Transcript of Proceedings

Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Waiver of transcript may be especially suitable for hearings under Rule 12.2. Transcripts of the proceedings shall be supplied to the parties at such rates as may be established by contract between the Board and the reporter, provided that ordinary copy of transcript shall be supplied to the appellant at an amount no greater than the cost of duplication.

Rule 25. Withdrawal of Exhibits

After a decision has become final the Board may, upon request and after notice to the other party, in its discretion permit the withdrawal or original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

Representation

Rule 26. The Appellant

An individual appellant may appear before the Board in person, a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any state, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.

Rule 27. The Government

Government counsel may, in accordance with their authority, represent the interest of the Government before the Board. They shall file notices of appearance with the Board, and notice thereof will be given appellant or appellant's attorney in the form specified by the Board from time to time.

Decisions

Rule 28. Decisions

(a) Decisions of the Board will be made in writing and authenticated copies of the decision will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions (except those required for good cause to be held confidential and not cited as precedents) shall be open for public inspection at the offices of the Board. Decisions of the Board will be made solely upon the record, as described in Rule 13.

(b) Any monetary award to a contractor by the Board shall be promptly paid in accordance with the procedures provided by 31 U.S.C. § 1304, as amended. To assure prompt payment the Recorder will forward the required forms to each party with the decision. If the parties do not contemplate an appeal or motion for reconsideration, they will execute the waiver forms which so state. The Government agency will forward the waiver and other forms with a copy of the decision to the Department of the Treasury for certification of payment.

Motion for Reconsideration

Rule 29. Motion for Reconsideration

A motion for reconsideration may be filed by either party. It shall set forth specifically the grounds relied upon to sustain the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

Suspension; Dismissals and Defaults; Remands

Rule 30. Suspensions; Dismissal Without Prejudice

The Board may suspend the proceedings by agreement of counsel for settlement discussions, or for good cause shown. In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

Rule 31. Dismissal or Default for Failure to Prosecute or Defend

Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to show cause why the appeal should not be dismissed or, in the case of a default by the Government, issue an order to show cause why the Board should not act thereon pursuant to Rule 35. If good cause is not shown, the Board may take appropriate action.

Rule 32. Remand from Court

Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court's order. The Board shall consider the reports and enter special orders governing the handling of the remanded case. To the extent the court's directives and time limitations permit, such orders shall conform to these rules.

Time, Computation and Extensions

Rule 33. Time, Computation and Extensions

(a) Where possible, procedural actions should be taken in less time than the maximum time allowed. Where appropriate and justified, however, extensions of time will be granted. All requests for extensions of time shall be in writing.

(b) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.

Ex parte Communications

Rule 34. Ex parte Communications

No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal, submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. The provision does not apply to consultation among Board members or the ex parte communications concerning the Board's administrative functions or procedures.

Sanctions

Rule 35. Sanctions

If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.

Effective Date

Rule 36. Effective Date

These rules shall apply (1) mandatorily, to all appeals relating to contracts entered into on or after 1 March 1979, and (2) at the contractor's election, to appeals relating to earlier contracts, with respect to claims pending before the contracting officer on 1 March 1979 or initiated thereafter.

20 February 2002

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LIST OF REFERENCES

Acquisition Community Connection, “Dispute Appeal Process”

[http://acc.dau.mil/simplify/ev.php?ID=1238_201&ID2=DO_TOPIC], August 2004

Acquisition Community Connection, “Contractor Files Claim”

[http://acc.dau.mil/simplify/ev.php?ID=1296_201&ID2=DO_TOPIC], August 2004

Acquisition Community Connection, “Contractor Officer Decision”

[http://acc.dau.mil/simplify/ev.php?ID=1297_201&ID2=DO_TOPIC], August 2004

Acquisition Community Connection, “Alternative Disputes Resolution”

[http://acc.dau.mil/simplify/ev.php?ID=1239_201&ID2=DO_TOPIC], August 2004

Acquisition Community Connection, “Arbitration”

[http://acc.dau.mil/simplify/ev.php?ID=1301_201&ID2=DO_TOPIC], August 2004

Acquisition Community Connection, “Mediation”

[http://acc.dau.mil/simplify/ev.php?ID=1302_201&ID2=DO_TOPIC], August 2004

Acquisition Community Connection, “Mini-trials”

[http://acc.dau.mil/simplify/ev.php?ID=1303_201&ID2=DO_TOPIC], August 2004

Acquisition Community Connection, “Fact-finding”

[http://acc.dau.mil/simplify/ev.php?ID=1304_201&ID2=DO_TOPIC], August 2004

Alternative Dispute Resolution: A Resource Guide,
[http://www.opm.gov/er/adrguide_2002/], October 2004

Armed Services Board of Contract Appeals, [<http://www.law.gwu.edu/ASBCA/>], August 2004

Engelbeck, R. Marshall, Acquisition Management. Management Concept Publishing.
2002

Federal Acquisition Regulation, [<http://farsite.hill.af.mil/>], October 2004

Merriam-Webster Online, [www.m-w.com], August 2004

SAF/AQ, [<http://www.safaq.hq.af.mil/>], October 2004

U.S. Code, Title 41 Public Contracts, Chapter 9 Contract Disputes,
[http://www.access.gpo.gov/uscode/title41/chapter9_.html], August 2004

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